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CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1929

FROM OCTOBER 7, 1929, TO AND INCLUDING
(IN PART) FEBRUARY 24, 1930

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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

WILLIAM HOWARD TAFT, Chief Justice.[1]
CHARLES EVANS HUGHES, Chief Justice.[1]
OLIVER WENDELL HOLMES, Associate Justice.
WILLIS VAN DEVANTER, Associate Justice.
JAMES CLARK McREYNOLDS, Associate Justice.
LOUIS D. BRANDEIS, Associate Justice.
GEORGE SUTHERLAND, Associate Justice.
PIERCE BUTLER, Associate Justice.
EDWARD T. SANFORD, Associate Justice.
HARLAN FISKE STONE, Associate Justice.

WILLIAM D. MITCHELL, Attorney General.
CHARLES E. HUGHES, Jr., Solicitor General.
CHARLES ELMORE CROPLEY, Clerk.
FRANK KEY GREEN, Marshal.

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[1] Mr. Chief Justice Taft, because of illness, did not sit after December 9, 1929, and resigned on February 3, 1930.

On February 3, 1930, President Hoover nominated Charles Evans Hughes, of New York, to be Chief Justice. The nomination was confirmed by the Senate on February 13. Mr. Hughes was commissioned February 13 and on the 24th of that month he took the oath in open court, and began his service as Chief Justice.

135424

SUPREME COURT OF THE UNITED STATES

Order of Allotment of Justices

It is ordered, That the following allotments be made of the Chief Justice and Associate Justices of this Court among the circuits, agreeably to the acts of Congress in such case made and provided, and that such allotment be entered of record, viz:

For the First Circuit, Oliver Wendell Holmes, Associate Justice.

For the Second Circuit, Harlan Fiske Stone, Associate Justice.

For the Third Circuit, Louis Dembitz Brandeis, Associate Justice.

For the Fourth Circuit, William H. Taft, Chief Justice.

For the Fifth Circuit, Edward T. Sanford, Associate Justice.

For the Sixth Circuit, James C. McReynolds, Associate Justice.

For the Seventh Circuit, Willis Van Devanter, Associate Justice.

For the Eighth Circuit, Pierce Butler, Associate Justice.

For the Ninth Circuit, George Sutherland, Associate Justice.

For the Tenth Circuit, Willis Van Devanter, Associate Justice.

April 10, 1929.

For next preceding allotment, see 278 U. S., p. IV.

RESIGNATION OF MR. CHIEF JUSTICE TAFT.

ORDER OF FEBRUARY 24, 1930

It is ordered by the court that the accompanying correspondence between members of the court and Mr. Chief Justice Taft upon his retirement as Chief Justice of the United States be this day spread upon the minutes and that it also be printed in the reports of the court.

SUPREME COURT OF THE UNITED STATES,
Washington, D. C., February 10, 1930.

DEAR CHIEF JUSTICE: We call you Chief Justice still, for we can not quickly give up the title by which we have known you for all these later years and which you have made so dear to us. We can not let you leave us without trying to tell you how dear you have made it. You came to us from achievements in other fields, and with the prestige of the illustrious place that you lately had held, and you showed in a new form your voluminous capacity for work and for getting work done, your humor that smoothed the rough places, your golden heart that has brought you love from every side, and, most of all, from your brethren whose tasks you have made happy and light. We grieve at your illness, but your spirit has given life an impulse that will abide whether you are with us or are away.

Affectionately yours,

(Signed) OLIVER WENDELL HOLMES.
WILLIS VAN DEVANTER.
J. C. MCREYNOLDS.
LOUIS D. BRANDEIS.
GEO. SUTHERLAND.
PIERCE BUTLER.
EDWARD T. SANFORD.
HARLAN F. STONE.

Hon. WILLIAM H. TAFT.

UNITED STATES SUPREME COURT,
Washington, D. C., February 12, 1930.

MY DEAR BRETHREN: I can not adequately say how deeply I am touched by your affectionate letter. I regretted for many reasons the necessity of tendering my resignation, but none so strong as the ending of those pleasant associations with each and all of you, which during the past nine years have been so dear to me. Only the advice of my doctors and my own conviction that I would be unable to continue adequately the great work of the court forced me to leave you. That work, in your hands, will go on as well without me, but I am grateful, nevertheless, for your words of appreciation.

Sincerely yours,

(Signed) WM. H. TAFT.

MR. JUSTICE HOLMES, *Acting Chief Justice.*
MR. JUSTICE VAN DEVANTER.
MR. JUSTICE MCREYNOLDS.
MR. JUSTICE BRANDEIS.
MR. JUSTICE SUTHERLAND.
MR. JUSTICE BUTLER.
MR. JUSTICE SANFORD.
MR. JUSTICE STONE.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1929.

GONZALEZ *v.* ROMAN CATHOLIC ARCHBISHOP OF MANILA.

CERTIORARI TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

No. 6. Argued April 8, 9, 1929.—Decided October 14, 1929.

1. A judgment of the Supreme Court of the Philippine Islands in a case in which the amount in controversy exceeds $25,000, is reviewable by this Court on certiorari. P. 11.
2. The Roman Catholic Archbishop of Manila is a juristic person amenable to the jurisdiction of the Philippine courts for the enforcement of any legal right; and a right claimed under a will to be appointed to, and receive the income from, a chaplaincy founded by the will is a subject-matter within the jurisdiction of those courts. P. 15.
3. The facts that the chaplaincy is a collative one and that its property was transferred to the spiritual properties of the Archbishopric, subject to ecclesiastical jurisdiction and control, affect the terms of the trust but do not deprive civil courts of jurisdiction to adjudicate legal rights arising therefrom. P. 16.
4. In the absence of fraud, collusion, or arbitrariness, the decisions of the proper church tribunals on matters purely ecclesiastical, although affecting civil rights, are accepted in litigation before the secular courts as conclusive, because the parties in interest made them so by contract or otherwise. P. 16.

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5. Pursuant to the will of its foundress, a perpetual collative chaplaincy was established in 1820. Such a chaplaincy is subject to ecclesiastical control, and intervention by the proper spiritual authority to appoint and ordain the chaplain is essential. The ecclesiastical law also prescribes the qualifications of the chaplain. *Held*, in accordance with the implied intention of the parties, that the Canon Law in force at the time of the presentation of an applicant for appointment, rather than that in force in 1820, governs his fitness, and he cannot complain of an amendment adopted at a time when he was ineligible under either law and was enjoying no right of which the amendment deprived him. P. 17.
6. The intention of the foundress of a collative chaplaincy, so far as expressed, was that the income should be applied to the celebration of masses and to the living of the chaplain, who should preferably be the nearest male relative in the line of descent from herself, or her grandson, the first incumbent. Four others of her descendants successively held the chaplaincy, the last of whom renounced it and was still living. During the resulting vacancy, the masses were duly celebrated and the Archbishop applied the surplus income currently to pious educational uses, supporting this by a custom of the archdiocese and provisions of Canon Law. *Held*, without deciding whether such disposition of the surplus was proper or what should be its disposition in the future, that a son of the last incumbent, who was properly refused appointment as chaplain because he had not the qualifications prescribed by the Canon Law, was not entitled, as the nearest relative, to the accrued surplus. P. 18.
7. Suit was brought by an individual to enforce his claimed right as sole beneficiary under a will to the appointment to, and accrued surplus income from, a collative chaplaincy. *Held*, that, on appeal, the action cannot be treated as a suit by him as representative of the heirs of the testatrix as a class to recover the surplus income during a vacancy. P. 19.

Affirmed.

CERTIORARI, 278 U. S. 588, to review a judgment of the Supreme Court of the Philippine Islands, which reversed a judgment recovered by Gonzalez directing the Archbishop of Manila to appoint him to a chaplaincy and to pay to him the income thereof accrued during its vacancy.

Mr. Howard Thayer Kingsbury, with whom *Messrs. Frederic R. Coudert* and *Allison D. Gibbs* were on the brief, for petitioner.

The decision below defeats the testamentary intentions of the foundress.

The registration should have been in the name of the "*Capellania*" itself as a juristic person. See *Capellania de Tombobong* v. *Antonio,* 8 Phil. Rep. 683; *Capellania de Tombobong* v. *Cruz,* 9 *id.* 145.

At no stage of the cause has the lawful character of the Foundation, under the applicable local law, been questioned. It was assumed, as obviously not subject to controversy, in *Gonzalez* v. *Harty,* 32 Phil. Rep. 328. See *Manila* v. *Archbishop,* 36 *id.* 145.

The same practice was there followed on this subject in the Philippines as prevails under English Ecclesiastical Law, namely, that the income of a benefice during a vacancy goes to the next incumbent. See Burn, Ecclesiastical Law, Vol. 4, p. 1, *et seq.*

The Canon (§ 1481) providing for a different disposition of the income of a vacant benefice appears to be an innovation of 1918, and it would, moreover, be inappropriate to apply it to a "*Capellania colativa familiar,*" limited to a particular family, such as this.

The inviolability of lawful testamentary intentions has been repeatedly declared and sustained by this Court. *Gray* v. *Noholoa,* 214 U. S. 108; *Kenaday* v. *Sinnott,* 179 U. S. 606. Spanish law recognized the same rule as applicable to the testamentary foundation of a Chaplaincy.

The decision below permits the Canon of 1918 to be applied retroactively to defeat and divest property rights and allows the ecclesiastical authorities to be both legislators and judges in their own cause.

The Chaplaincy here involved is a *Capellania colativa familiar,* being "instituted with the intervention of the ecclesiastical authority" and calling "for relatives of the founder or of the persons whom he designed as trunk, to enjoy the Chaplaincy."

Such chaplaincies appear to have been a frequent form of pious foundation, both in the Islands and in Spain, where, however, they were disamortized by a series of legislative acts, beginning in or about 1820 and continuing until 1867. See Alcubilla, Diccionario, Vol. 2, p. 118, *et seq.* In the Philippines they have been undisturbed by legislation, and are recognized as having juristic entity. Their purpose appears to have been to provide a source of support for a succession of members of the founder's family and at the same time to secure the saying of masses for the benefit of the family. The ecclesiastical character of the incumbent from time to time appears to have been a minor consideration.

The plenary power of ecclesiastical authority is limited to matters ecclesiastical and spiritual. When property rights are affected, the law of the land must prevail. *Free Church* v. *Overtoun,* [1904] A. C., 515.

When the similar chaplaincies in Spain were disamortized by legislation, the property rights pertaining thereto were preserved for the "nearest relative of the preferred line," and conflicting claims were determined by the civil courts. See 8 Jurisprudencia Civil, 372, May 30, 1863; Alcubilla, Diccionario, Vol. 2, pp. 259, 261. This disamortization, however, was not extended to the Philippines. *Catholic Church* v. *Municipality,* 10 Phil. Rep. 659.

Under the Will and Deed of Foundation it was sufficient that the candidate should be qualified ultimately to become a priest. He was not required to be already a "clerical."

It is contrary to the underlying conceptions of American jurisprudence, which now protect the sanctity of property and contract rights in the Philippines (*Cariño* v. *Insular Government,* 212 U. S. 449; *Vilas* v. *Manila,* 220 U. S. 345), that any ecclesiastical power, however exalted, should first, as legislator, change its own laws or canons to the prejudice of outstanding property rights, and then, as judge or administrative functionary exercising discretionary power, interpret and enforce them to the impoverishment of the individual or individuals in whom the property rights subsist and to the enrichment of its own coffers for use in other directions.

This suit is in name against the Archbishop of Manila, but he stands as the representative of the Church (*Harty* v. *Sandin,* 11 Phil. Rep. 451), which, in the territories acquired by the Treaty of 1898 with Spain, is a solidary juristic entity capable of holding and owning property, and therefore of incurring and performing obligations attached to such ownership. *Ponce* v. *Church,* 210 U. S. 296; *Santos* v. *Church,* 212 U. S. 463; *Barlin* v. *Ramirez,* 7 Phil. Rep. 41; *Evangelista* v. *Ver,* 8 Phil. Rep. 653.

The Spanish Law fully recognized the obligations growing out of a fiduciary relation and was rigid in forbidding a fiduciary "to create in himself an interest in opposition" to that of the beneficiary. *Severino* v. *Severino,* 44 Phil. Rep. 343; *Orden de Predicadores* v. *Water District,* 44 Phil. Rep. 292.

The Canon Law itself, both before and in the revision of 1918, recognizes the lack of power in the ecclesiastical authorities to vary the terms of a testamentary foundation. Pitonius, De Controversiis Patronorum, 1719, Allegatio XXXIII, n. 37 (Tom. 1, p. 275).

The revision of 1918 in like manner recognizes the sanctity of conditions and limitations attached to benefices, once they have been duly approved and accepted

by the competent ecclesiastical authorities. See Canon 1417, §§ 1, 2.

Appeal to the Pope was not a necessary condition precedent to recourse to the civil courts.

If a class suit be deemed necessary, this suit can and should be so treated. See *Williams' Administrator* v. *Newman,* 93 Va. 719; *Neeley* v. *Jones,* 16 W. Va. 625; *Smith* v. *Swormstedt,* 16 How. 288; *Stewart* v. *Dunham,* 115 U. S. 61; *Supreme Tribe* v. *Cauble,* 255 U. S. 356; *Bismorte* v. *Aldecoa & Co.,* 17 Phil. Rep. 480; *Harty* v. *Macabuhay,* 39 Phil. Rep. 495.

Mr. William D. Guthrie, with whom *Mr. George J. Gillespie* was on the brief, for respondent.

The petitioner's theory of a civil right enforcible in the secular courts is entirely contradictory to the clear and expressed intention of the testatrix herself; for it is indisputable that she was a devout member of the Roman Catholic Church, and intended to establish a "collative chaplaincy" with all that the term implied and to have it subject to the laws and jurisdiction of that Church. It is likewise indisputable that the deed of foundation executed by her executor expressly segregated and transferred the property of the chaplaincy "to the spiritual properties of this Archbishopric" in the broadest possible terms and "renounces with all solemnity the laws that may favor the said decedent," and equally indisputable that the decree of approval executed by the Metropolitan Archbishop accepted and approved the foundation of the chaplaincy in the will and deed of foundation and thereby expressly converted the agreed value of the property "into spiritual property of a perpetual character subject to the ecclesiastical forum and jurisdiction." It would be difficult, if not impossible, to devise language more clearly evidencing the intention to remove the property entirely beyond the jurisdiction of the secular courts.

"The corporate existence of the Roman Catholic Church, as well as the position occupied by the Papacy, has always been recognized by the Government of the United States." *Ponce* v. *Roman Catholic Church,* 210 U. S. 296.

And the Treaty of Paris (30 Stat. 1754) expressly covenanted (Article VIII) that the rights of the Roman Catholic Church would be duly maintained. See *Gonzalez* v. *Harty,* 32 Phil. Rep. 328. *Evangelista* v. *Ver,* 8 Phil. Rep. 653; *Chase* v. *Cheney,* 58 Ill. 509; *Gibbs* v. *Gilead Ecclesiastical Society,* 38 Conn. 153; *United States* v. *Cañete,* 38 Phil. Rep. 253; *Watson* v. *Jones,* 13 Wall. 679; *Shepard* v. *Barkley,* 247 U. S. 1.

Watson v. *Jones, supra,* relies upon the "implied consent" of "all who unite themselves to such a body" to submit to the ecclesiastical government. In the case at bar, however, the consent to the ecclesiastical government, which was merely implicit in *Watson* v. *Jones,* is explicit, and there is neither room nor necessity for presumption.

An illustrative example of the propriety of applying the principles of Canon Law in a controversy growing out of ecclesiastical relations, is found in the case of *Jones* v. *The Registrar,* 18 Porto Rico 124.

See also for interesting and striking decisions as to the doctrine of noninterference with Church authorities, the following additional cases: *Baxter* v. *McDonnell,* 155 N. Y. 83; *Connitt* v. *Reformed Church,* 54 N. Y. 551; *Walker* v. *Wainwright,* 16 Barb. (N. Y.) 486; *First Presbyterian Church* v. *First Cumberland Presbyterian Church,* 245 Ill. 74; *Fussell* v. *Hail,* 233 Ill. 73; *Wehmer* v. *Fokenga,* 57 Neb. 510; *Holwerda* v. *Hoeksema,* 232 Mich. 648; *Chase* v. *Cheney,* 58 Ill. 509; *O'Donovan* v. *Chatard,* 97 Ind. 421; *White Lick Meeting* v. *White Lick Meeting,* 89 Ind. 136; *Hackney* v. *Vawter,* 39 Kan. 615.

The courts have likewise held, and the policy of our government of noninterference in religious matters requires, that in any event an appeal to the ecclesiastical authorities for redress must first be taken, if available, before a civil court will intervene. *State ex rel. McNeill* v. *Church,* 84 Ala. 23; *German Church* v. *Seibert,* 3 Pa. St. 282. Such a right of appeal is expressly given.

The will of the foundress in the plainest terms requires a collative chaplaincy, not the mere laical chaplaincy which is, in effect, the result sought for by petitioner; and her will, moreover, urged as "the supreme law to be observed," fails utterly to make any provision as to successors.

The Roman Catholic Archbishops of Manila, in their discretion, as vacancies arose naturally gave preference to the nearest qualified or acceptable relative of the testatrix; but this practice, considered by petitioner a binding practical construction, did not estop the duly constituted representatives and tribunals of the Church from exercising their discretion or applying the provisions of the Canon Law. An unauthorized construction of the will could not, no matter how long continued, materially change or supplant the provisions of the trust as established by the testatrix herself and accepted by the Church. *Attorney General* v. *Rochester,* 5 DeG. M. & G. 797; *Attorney General* v. *Beverly,* 6 DeG. M. & G. 256; *Drummond* v. *Attorney General,* 2 H. L. Cas. 837.

The petitioner was not qualified under the Codex Juris Canonici of 1917 [promulgated in 1918]. He was not shown to be qualified under the prior Canon Law.

Omnia praesumunter rite et solemniter esse acta, may with particular propriety be applied to the present case.

Petitioner's right to receive any part of the income is contingent upon his right to be appointed as chaplain. The right of a minister to the temporal fruits of his office is dependent upon his continued "rightful incumbency."

State ex rel. Hynes v. *Catholic Church,* 183 Mo. App. 190; *Satterlee* v. *Williams,* 20 D. C. App. 393; *Chase* v. *Cheney,* 58 Ill. 509.

Prior to the codification in 1917, a collative chaplain would not have been entitled to appropriate the whole surplus income for his own purposes; it must be devoted to pious uses and good works.

But aside from the Canon Law and even if the plaintiff had established an heritable interest in the property of the testatrix, the fact that the increase of the income has produced a large surplus over the usual cost of the masses, would not establish any legal heritable right in the petitioner or in any of his family or class, to such surplus.

The rule obtaining in the secular courts is in this respect precisely the same as the Canon Law on the subject, viz., the surplus belongs to the Church, for its general pious purposes. *Mormon Church* v. *United States,* 136 U. S. 1; *Ponce* v. *Roman Catholic Church,* 210 U. S. 296; *Attorney General* v. *The Minister,* 36 N. Y. 452.

See also, *Attorney General* v. *Rector et al.,* 91 Mass. 422; *American Academy* v. *Harvard College,* 78 Mass. 582; *In re Campden Charities,* 18 L. R. Ch. Div. 310; *Bishop* v. *Adams,* 7 Ves. Jr. 324; *Attorney General* v. *Wansay,* 15 Ves. Jr. 230; *Attorney General* v. *Dixie,* 2 Myl. & K. 342.

See also *Sicles* v. *New Orleans,* 80 Fed. 868; *Associate Alumni* v. *Seminary,* 163 N. Y. 417; *Brigham* v. *Hospital,* 134 Fed. 513; *Goode* v. *McPherson,* 51 Mo. 126; *Bridgeport Library* v. *Burroughs Home,* 85 Conn. 309; *Strong* v. *Doty,* 32 Wis. 381; *Trustees* v. *Wilson,* 78 N. J. Eq. 1; *Sanderson* v. *White,* 18 Pick. (Mass.) 328.

If this proceeding be regarded as a suit in which the plaintiff is asking the court to change the present proceeding for a mandamus and accounting into a suit in equity for relief to a class of heirs as alleged beneficiaries of a trust, the class concerned must necessarily be, not the

heirs generally, but only such heirs as are qualified for appointment to the chaplaincy in question. A class suit cannot be successfully maintained by one who is not himself qualified to be a member of the class. *Watson* v. *Nat'l Life & Trust Co.*, 189 Fed. 872.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

This case is here on certiorari to the Supreme Court of the Philippine Islands. 278 U. S. 588. The subject matter is a collative chaplaincy in the Roman Catholic Archdiocese of Manila, which has been vacant since December 1910.[1] The main questions for decision are whether the petitioner is legally entitled to be appointed the chaplain and whether he shall recover the surplus income accrued during the vacancy.

Raul Rogerio Gonzalez, by his guardian *ad litem*, brought the suit against the Archbishop in the Court of

[1] A chaplaincy in the Roman Catholic Church is an institution founded by an individual for the purpose of celebrating or causing to be celebrated annually a certain number of masses conforming to the will of the founder. Chaplaincies are commonly divided into two classes—lay and ecclesiastical. A laical or mercenary chaplaincy is one instituted without the intervention of ecclesiastical authority; does not require a title in order to be ordained; and is not subject to ecclesiastical authority. The ecclesiastical or collative chaplaincy, although also founded by an individual, is one erected into a benefice by the proper spiritual authority; requires a title of ordination; and is thus subject to ecclesiastical control. When the foundation of an ecclesiastical or collative chaplaincy calls for relatives of the founder to enjoy the chaplaincy, it is called *colativa familiar*. When individuals of a certain family are not called to the possession but the patron is authorized to nominate, then the chaplaincy is called *colativa simple* or *gentilicia*. But whether the chaplaincy is *colativa familiar* or *colativa simple*, intervention of the proper spiritual authority to appoint and ordain is essential. Alcubilla, Diccionario de la Administracion Española, (5 Ed.) Vol. II, p. 259; The Catholic Encyclopedia, Vol. III, p. 580.

First Instance of Manila, on August 5, 1924. He prayed for judgment declaring the petitioner the lawful heir to the chaplaincy and its income; establishing the right of the petitioner and his successors to be appointed to and receive the income of the chaplaincy during their infancy whenever it may be vacant and, pending such appointment, to receive the income for their maintenance and support; declaring the trust character of the property and ordering it to be so recorded; directing the Archbishop to appoint the petitioner chaplain and to account to him for the income of the property from 1910 on; and directing the defendant to pay the petitioner 1,000 pesos a month pending the final determination of the case. The trial court directed the Archbishop to appoint the petitioner chaplain; and ordered payment to him of 173,725 pesos ($86,862.50), that sum being the aggregate net income of the chaplaincy during the vacancy, less the expense of having the prescribed masses celebrated in each year. It reserved to the petitioner any legal right he may have to proceed in the proper court for cancellation of the certificate of registration of the property in the name of the Archbishop. The Supreme Court of the Philippine Islands reversed the judgment on February 4, 1928, and absolved the Archbishop from the complaint, "without prejudice to the right of proper persons in interest to proceed for independent relief," in respect to the income accrued during the vacancy, or in respect to the reformation of the certificate of registration so as to show the fiduciary character of the title. As the amount in controversy exceeds $25,000, this Court has jurisdiction on certiorari, Act of February 13, 1925, c. 229, § 7, 43 Stat. 936, 940.

The chaplaincy was founded in 1820, under the will of Doña Petronila de Guzman. By it, she requested "the Father chaplain to celebrate sixty masses annually" in behalf of the souls of her parents, brothers, sisters and

herself. The deed of foundation, which was executed by the testamentary executor of Doña Petronila, provided that "said property is segregated from temporal properties and transferred to the spiritual properties of this Archbishopric, without its being possible to alienate or convert the property as such into any other estate for any cause, even though it be of a more pious character, . . . so that by virtue of this Deed of Foundation canonical collation may be conferred on the said appointed chaplain." By appropriate proceedings an ecclesiastical decree approved "the foundation of the chaplaincy with all the circumstances and conditions provided for in said clause (of the will) and in the deed of foundation, as well as the imposition (charge) of seventeen hundred pesos against said building, converting said sum into spiritual property of a perpetual character subject to the ecclesiastical forum and jurisdiction."

The will provided that the foundation should effect the immediate appointment as chaplain of D. Esteban de Guzman, the great-grandson of the testatrix; and "in his default, the nearest relative, and in default of the latter, a collegian (colegial) of San Juan de Letran, who should be an orphan *mestizo,* native of this said town." It named the president of that college as the patron of the chaplaincy. Esteban was appointed chaplain in 1820. From time to time thereafter four other descendants of the testatrix were successively appointed. The latest of these renounced the chaplaincy in December, 1910; married soon thereafter; and in 1912 became the father of the petitioner, Raul Rogerio Gonzalez, who is a legitimate son of the fifth chaplain and claims to be the nearest relative in descent from the first chaplain and the foundress.

Raul was presented to the Archbishop for appointment in 1922. The Archbishop refused to appoint him, on the ground that he did not then have "the qualifications required for chaplain of the said chaplaincy." He added:

"The grounds of my conclusion are the very canons of the new Code of Canon Law. Among others, I can mention canon 1442 which says: 'Simple chaplaincies or benefices are conferred upon clergymen of the secular clergy,' in connection with canon 108, paragraph 1, 'Clergymen are those already initiated in the first tonsure' and canon 976, paragraph 1, 'No one can be promoted to first tonsure before he has begun the course in theology.' In view of the Canon as above mentioned, and other reasons which may be adduced, I believe that the boy, Raul Gonzalez, is not legally (ecclesiastically speaking) capacitated to the enjoyment of a chaplaincy."

Ever since the Council of Trent (1545–1563), it has been the law of the church that no one can be appointed to a collative chaplaincy before his fourteenth year. When Raul was presented for appointment, he was in his tenth year. He was less than twelve when this suit was begun. He was fourteen when the trial court entered its judgment. It is also urged on behalf of the Archbishop that at no time since that Council could one be lawfully appointed who lacked elementary knowledge of Christian Doctrine.

The new Codex Juris Canonici, which was adopted in Rome in 1917 and was promulgated by the Church to become effective in 1918, provides that no one shall be appointed to a collative chaplaincy who is not a cleric, Can. 1442. It requires students for the priesthood to attend a seminary; and prescribes their studies, Can. 1354, 1364. It provides that in order to be a cleric one must have had "prima tonsura," Can. 108, par. 1; that in order to have "prima tonsura" one must have begun the study of theology, Can. 976, par. 1; and that in order to study theology one must be a "bachiller," that is, must have obtained the first degree in the sciences and liberal arts, Can. 1365. It also provides that no one may validly receive ordination unless in the opinion of the ordinary he

has the necessary qualifications, Can. 968, par. 1, 1464. Petitioner concedes that the chaplaincy here involved is a collative one; and that Raul lacked, at the time of his presentment and of the commencement of the suit, the age qualification required by the Canon Law in force when the chaplaincy was founded.[2] It is also conceded that he lacked, then, and at the time of the entry of the judgment, other qualifications of a candidate for a collative chaplaincy essential, if the new Codex was applicable.

Raul's contention, in effect, is that the nearest male relative in descent from the foundress and the first chaplain, willing to be appointed chaplain, is entitled to enjoy the revenues of the foundation, subject only to the duty of saying himself the sixty masses in each year, if he is qualified so to do, or of causing them to be said by a qualified priest and paying the customary charge therefor out of the income. He claims that the provisions of the new Codex are not applicable and that his rights are to be determined by the Canon Law in force at the time the chaplaincy was founded; and that the judgment of the trial court should be reinstated, because he possessed at the time of the entry of the judgment all the qualifications required by the Canon Law in force in 1820. Raul argues that contemporaneous construction and long usage have removed any doubt as to what these qualifications were; that when the foundation was established, and for a long time thereafter, the ecclesiastical character of the incumbent was a minor consideration; that this is shown by the administration of this chaplaincy; and that his own ecclesiastical qualifications, at the time of the entry of the

[2] In order to overcome this obstacle, petitioner filed an amended complaint in the trial court, without objection, when he was in his fourteenth year. The Supreme Court assumed "for the purposes of this decision that the immaturity of the plaintiff in point of age is not a fatal obstacle to the maintenance of the action."

judgment in the trial court, were not inferior to those of the prior incumbents. He asserts that, although chaplaincies were disamortized in Spain prior to 1867, Alcubilla, Diccionario, Vol. II, p. 118, they had in the Philippines remained undisturbed by any legislation of Spain; and that the rights of the church were preserved by Article VIII of the Treaty of Paris. 30 Stat. 1754, 1758. *Ponce* v. *Roman Catholic Church,* 210 U. S. 296, 315–322. He contends that to deprive him of his alleged right to the chaplaincy because of a change made in 1918 in the Canon Law would violate the Constitution of the United States, the Treaty with Spain of 1898, and the Organic Act of the Philippine Islands.

The trial court rested its judgment for Raul largely on the ground that he possessed, at the time of its entry, the qualifications required by the Canon Law in force when the chaplaincy was founded; and that, hence, he was entitled both to be appointed chaplain and to recover the income accrued during the vacancy, even though he did not possess the qualifications prescribed by the new Codex then otherwise in force. The Supreme Court held that to give effect to the provisions of the new Codex would not impair the obligation of the contract made in 1820, as it was an implied term of the deed of foundation that the qualifications of a chaplain should be such as the church authorities might prescribe from time to time; and that, since Raul confessedly did not possess the qualifications prescribed by the new Codex which had been promulgated before he was presented, he could not be appointed.

First. The Archbishop interposes here, as he did below, an objection to the jurisdiction of the Philippine courts. He insists that, since the chaplaincy is confessedly a collative one, its property became spiritual property of a perpetual character subject to the jurisdiction of the ec-

clesiastical forum; and that thereby every controversy concerning either the right to appointment or the right to the income was removed from the jurisdiction of secular courts. The objection is not sound. The courts have jurisdiction of the parties. For the Archbishop is a juristic person amenable to the Philippine courts for the enforcement of any legal right; and the petitioner asserts such a right. There is jurisdiction of the subject matter. For the petitioner's claim is, in substance, that he is entitled to the relief sought as the beneficiary of a trust.

The fact that the property of the chaplaincy was transferred to the spiritual properties of the Archbishopric affects not the jurisdiction of the court, but the terms of the trust. *Watson* v. *Jones,* 13 Wall. 679, 714, 729. The Archbishop's claim in this respect is that by an implied term of the gift, the property, which was to be held by the church, should be administered in such manner and by such persons as may be prescribed by the church from time to time. Among the church's laws which are thus claimed to be applicable are those creating tribunals for the determination of ecclesiastical controversies. Because the appointment is a canonical act, it is the function of the church authorities to determine what the essential qualifications of a chaplain are and whether the candidate possesses them. In the absence of fraud, collusion, or arbitrariness, the decisions of the proper church tribunals on matters purely ecclesiastical, although affecting civil rights, are accepted in litigation before the secular courts as conclusive, because the parties in interest made them so by contract or otherwise.[3] Under like circumstances, effect is given in the courts to the determinations

[3] *Watson* v. *Jones,* 13 Wall. 679, 727, 733; *Shepard* v. *Barkley,* 247 U. S. 1; s. c. *Barkley* v. *Hayes,* 208 Fed. 319, 327, aff'd *sub. nom. Duvall* v. *Synod of Kansas,* 222 Fed. 669; *Brundage* v. *Deardorf,* 92 Fed. 214, 228; *Connitt* v. *Reformed Protestant Dutch Church,* 54 N. Y. 551, 562.

of the judicatory bodies established by clubs and civil associations.[4]

Second. The Archbishop contended that Raul lacked even the minimum of training and knowledge of Christian Doctrine made indispensable by the Canon Law in force in 1820; that his confessed lack of the essential age at the time of the presentment and also at the time of the institution of the suit were unsurmountable obstacles to the granting of the prayer for appointment to the chaplaincy; and, moreover, that the failure to take an appeal to the Pope from the decision of the Archbishop, as provided by the Canon Law, precluded resort to legal proceedings. We have no occasion to consider the soundness of these contentions. For we are of opinion that the Canon Law in force at the time of the presentation governs, and the lack of the qualification prescribed by it is admitted. Neither the foundress, nor the church authorities, can have intended that the perpetual chaplaincy created in 1820 should, in respect to the qualifications of an incumbent, be forever administered according to the canons of the church which happened to be in force at that date. The parties to the foundation clearly contemplated that the Archbishop would, before ordination, exercise his judgment as to the fitness of the applicant; and they must have contemplated that, in the course of the centuries, the standard of fitness would be modified.

When the new Codex was promulgated in 1918 Raul was only six years old and had not yet been presented. If he had been presented, he obviously could not have been appointed. No right was then being enjoyed by him

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[4] *Commonwealth* v. *Union League,* 135 Pa. 301, 327; *Engel* v. *Walsh,* 258 Ill. 98, 103; *Richards* v. *Morison,* 229 Mass. 458, 461; *People ex rel. Johnson* v. *New York Produce Exchange,* 149 N. Y. 401, 409–10, 413–14; *Van Poucke* v. *Netherland St. Vincent De Paul Society,* 63 Mich. 378.

of which the promulgation of the new Codex deprived him. When he was presented later, he was ineligible under the then existing Canon Law. In concluding that Raul lacked the qualifications essential for a chaplain the Archbishop appears to have followed the controlling Canon Law. There is not even a suggestion that he exercised his authority arbitrarily.

Third. Raul urges that, even though he is not entitled to be appointed chaplain, he is entitled to recover the surplus net income earned during the vacancy. Indeed, it is the property rights involved that appear to be his main consideration. The value of the property in 1820 was about 1,700 pesos. The annual net income was then 180 pesos, a sum sufficient only to defray the annual expense of sixty masses. The annual net income has grown to about 12,000 pesos; and the annual expense of the sixty masses does not now exceed 300 pesos. In each year during the vacancy the masses have been duly celebrated. The surplus income accruing during the vacancy has been used by the Archbishop currently for pious purposes, namely, education. By canon 1481 of the new Codex the surplus income of a chaplaincy, after deducting expenses of the acting chaplain, must one-half be added to the endowment or capital and one-half to the repair of the church, unless there is a custom of using the whole for some common good to the diocese. The use made of the surplus of this chaplaincy was in accordance with what was claimed to be the long established custom of the Archdiocese. Both the custom and the specific application made of this surplus have been approved by the Holy See. The Supreme Court held that since Raul had sought the income only as an incident of the chaplaincy, he could not recover anything.

Raul's claim, which is made even in respect to income accrued prior to his birth, is rested upon some alleged right by inheritance, although his father is still living.

The intention of the foundress, so far as expressed, was that the income should be applied to the celebration of masses and to the living of the chaplain, who should preferably be the nearest male relative in the line of descent from herself or the first chaplain. The claim that Raul individually is entitled as nearest relative to the surplus by inheritance is unsupported by anything in the deed of gift or the applicable law. Since Raul is not entitled to be appointed chaplain, he is not entitled to a living from the income of the chaplaincy.

Raul urges also an alleged right as representative of the heirs of the testatrix as a class. This suggestion was, we think, properly met by the ruling of the Supreme Court that the suit was not brought as a class suit. Whether the surplus income earned during the vacancy has been properly disposed of by the Archbishop and what disposition shall be made of it in the future we have no occasion to enquire. The entry of the judgment without prejudice "to the right of proper persons in interest to proceed for independent relief" leaves any existing right of that nature unaffected.

Affirmed.

FEDERAL TRADE COMMISSION *v.* KLESNER.

CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 8. Argued April 10, 1929.—Decided October 14, 1929.

1. Section 5 of the Federal Trade Commission Act, unlike the Interstate Commerce Act, does not provide private persons with an administrative remedy for private wrongs. P. 25.
2. A complaint may be filed under § 5 only "if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public," and this requirement is not satisfied merely by proof that there has been misapprehension and confusion on the part of purchasers, or even that they have been deceived.

To justify filing a complaint the public interest must be specific and substantial. P. 27.

3. The Commission has jurisdiction of a complaint authorized by its resolution declaring in appropriate form that the Commission has reason to believe that the party complained of is violating § 5 of the Act and that it appears to the Commission that a proceeding in respect thereof would be in the interest of the public; but its action in authorizing the filing of a complaint, like its action in making an order thereon, is subject to judicial review. P. 29.
4. Whenever in the course of the proceeding before the Commission the specific facts established show, as a matter of law, that the proceeding is not in the public interest, the Commission should dismiss the complaint; and if, instead, it enters an order and brings suit to enforce it, the court, without inquiry into the merits, should dismiss the suit. P. 30.
5. S had long engaged in the business of making and selling window shades in the District of Columbia under the name "The Shade Shop," and in 1914 occupied part of K's store. In 1915, S removed from K's shop in violation of his agreement. As a result of the ensuing controversy, K, who had previously sold window shades only incidentally to his principal business of painting and paper hanging, opened that line in the space vacated by S and advertised it as "Shade Shop," generally with the qualification "Hooper & Klesner." Five years later, and after S's suit for an injunction had been dismissed by the Supreme Court of the District, the complaint before the Commission was filed. A desist order was entered nearly two years later. This suit to enforce the Commission's order was begun nearly nine years after K had instituted the course of conduct complained of. No claim was made that K's goods were inferior to S's or that the public otherwise suffered financially. *Held*, that the filing of the complaint was not in the public interest and that this suit should, therefore, be dismissed. P. 30.

25 F. (2d) 524, affirmed.

CERTIORARI, 278 U. S. 591, to review a judgment of the Court of Appeals of the District of Columbia dismissing a suit to enforce an order of the Federal Trade Commission. The judgment is affirmed on a ground different from that adopted by the court below. For earlier decisions in the same case, see 6 F. (2d) 701; 274 U. S. 145.

Mr. Adrien F. Busick, Assistant Chief Counsel, Federal Trade Commission, with whom *Attorney General Mitchell* and *Messrs. Robert E. Healy,* Chief Counsel, and *James W. Nichol* were on the brief, for petitioner.

The words "if it shall appear to the Commission that a proceeding . . . would be to the interest of the public" confer absolute discretion upon the Commission to determine whether a proceeding shall be instituted, and this is the only purpose of the provision. If the Commission so determines, it proceeds in the manner prescribed by the statute. If it determines not to proceed, it can not be compelled to do so by mandamus or by other process of the courts, even though it be admitted that the method of competition complained of is unfair. If it proceed, then the only question to be determined by the Commission or by the courts at the conclusion of the case is whether the method of competition "is prohibited by this act."

No question of public interest is involved in the issuance of an order to cease and desist from the use of the method, but only the question whether it is unfair within the meaning of the statute. If the method is unfair, then the order, it is submitted, can not be set aside because of the absence, in the opinion of the court, of a public interest in instituting the proceeding. *People* v. *Ballard,* 134 N. Y. 269; *Hill Bros.* v. *Federal Trade Comm'n,* 9 F. (2d) 481; *Toledo Pipe Co.* v. *Federal Trade Comm'n,* 11 F. (2d) 337; *Moir* v. *Federal Trade Comm'n,* 12 F. (2d) 22.

But if it be necessary affirmatively to show a public interest, in this case it sufficiently appears. That interest lies in the protection of the public of the District of Columbia from fraud and deception in commerce. In expressly applying the law to the District of Columbia, Congress acted in its constitutional capacity as a local legislature for the District. The business of each of the

companies involved, viewed as local business in window shades, is very substantial.

Moreover, the mere number of the purchasing public affected by the use of an unfair method of competition is not controlling as to its illegality. The principle is the same whether many persons or few are deceived and defrauded. To make numbers the test of the validity of the order would require the endless taking of testimony to determine the number deceived in each case. See *Federal Trade Comm'n* v. *Balmé*, 23 F. (2d) 615; *Juvenile Shoe Corp'n* v. *Federal Trade Comm'n*, 289 Fed. 57.

Mr. Clarence R. Ahalt submitted for respondent.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

This case is here on certiorari, for the second time. It was brought in the Court of Appeals of the District of Columbia by the Federal Trade Commission under § 5 of the Act of September 26, 1914, c. 311, 38 Stat. 717, 719, to enforce an order entered by it. The order directs Klesner, an interior decorator, who does business in Washington under the name of Hooper & Klesner, to "cease and desist from using the words 'Shade Shop' standing alone or in conjunction with other words as an identification of the business conducted by him, in any manner of advertisement, signs, stationery, telephone, or business directories, trade lists or otherwise." That court dismissed the suit on the ground that, unlike United States circuit courts of appeals, it lacked jurisdiction to enforce orders of the Federal Trade Commission. 6 F. (2d) 701. On the first certiorari, we reversed the decree and directed that the cause be remanded for further proceedings. *Federal Trade Commission* v. *Klesner*, 274 U. S. 145. Then the case was reargued before the Court of Appeals, on the pleadings and a transcript of the record before the

Commission; and was dismissed on the merits, with costs. 25 F. (2d) 524. This second writ of certiorari was thereupon granted. 278 U. S. 591. We are of opinion that the decree of the Court of Appeals should be affirmed—not on the merits, but upon the ground that the filing of the complaint before the Commission was not in the public interest.

The conduct which the Commission held to be an unfair method of competition practiced within the District had been persisted in by Klesner ever since December, 1915. The complaint before the Commission was filed on December 18, 1920. The order sought to be enforced was entered June 23, 1922. This suit was begun on May 13, 1924. The evidence before the Commission, which occupies 394 pages of the printed record in this Court, is conflicting only to a small extent. The findings of the Commission are in substance as follows:

Sammons has for many years done business in Washington as maker and seller of window shades, under the name of "The Shade Shop." Prior to 1914, that name had, by long use, come to signify to the buying public of the District the business of Sammons. The concern known as Hooper & Klesner has also been in business in Washington for many years. Prior to 1915, its trade had consisted mainly of painting and of selling and hanging wallpaper. It had dealt also, to some extent, in window shades, taking orders which it had executed either by Sammons or some other maker of window shades. In 1914, Hooper & Klesner leased a new store pursuant to an arrangement with Sammons, and sub-let to him a part of it. There Sammons continued his business of making and selling window shades as an independent concern under the name of "The Shade Shop." His gross sales there were at the rate of $60,000 a year. On a Sunday in November, 1915, he removed all his effects from those

premises and established his business in another building four doors away.

Sammons' removal was in confessed violation of his agreement with Hooper & Klesner. An acrimonious controversy ensued. Threats of personal violence led to Sammons' having Klesner arrested; and this to bitter animosity. Out of spite to Sammons, and with the purpose and intent of injuring him and getting his trade, Hooper & Klesner decided to conduct on its own account, in the premises which Sammons had vacated, the business of making and selling window shades. It placed upon its show windows, and also upon its letterheads and billheads, the words "Shade Shop"; and listed its business in the local telephone directory as "Shade Shop, Hooper & Klesner" and as "Shade Shop." A like sign was placed on its delivery trucks. This use by Hooper & Klesner of the term "Shade Shop" has caused, and is causing, "confusion to the window-shade purchasing public throughout the District"; and, on certain occasions, customers who entered Hooper & Klesner's shop were deceived by employees, being led to believe that it was Sammons'. Meanwhile, Klesner had become the sole owner of the business.

Such were the findings of the Commission. The Court of Appeals concluded that there was no showing either that Klesner was attempting to dispose of his goods under the pretense that they were the goods of Sammons, or that he was attempting to deceive or entice any of Sammons' customers; that the evidence introduced to show deception went no further than that some of the public may have purchased from Klesner under a mistaken belief that they were dealing with Sammons; that the words "Shade Shop" were being used by Klesner always in connection with the words Hooper & Klesner; and that the term "Shade Shop" as used by Klesner merely indicated

that his store was a place where window shades were made and sold. The Court of Appeals ruled that these words, being descriptive of a trade or business, were incapable of exclusive appropriation as a legal trademark or trade name; and that there was nothing in the facts to justify the charge of unfair competition. It, therefore, dismissed the suit on the merits, the ground of decision being that there was a lack of those facts which, in a court of law or of equity, are essential to the granting of relief for alleged acts of unfair competition.

We need not decide whether the Court of Appeals was justified in all of its assumptions of fact or in its conclusions on matters of law. For we are of opinion that the decree should be affirmed on a preliminary ground which made it unnecessary for that court to enquire into the merits. Section 5 of the Federal Trade Commission Act does not provide private persons with an administrative remedy for private wrongs. The formal complaint is brought in the Commission's name; the prosecution is wholly that of the Government; and it bears the entire expense of the prosecution. A person who deems himself aggrieved by the use of an unfair method of competition is not given the right to institute before the Commission a complaint against the alleged wrongdoer. Nor may the Commission authorize him to do so. He may of course bring the matter to the Commission's attention and request it to file a complaint.[1] But a denial of his request is final. And if the request is granted and a proceeding is

[1] The rules of practice adopted by the Commission require that the application be in writing and "contain a short and simple statement of the facts constituting the alleged violation of law and the name and address of the applicant and of the party complained of." Rules of Practice, No. II. See Annual Report of the Federal Trade Commission for 1928, pp. 17, 18, 41, 42; and Exhibit 5, p. 132. As to changes made in the procedure and policy March 17, 1925 and September 17, 1928, see *id.*, Exhibit 1, pp. 117–119.

instituted, he does not become a party to it or have any control over it.[2]

The provisions in the Federal Trade Commission Act concerning unfair competition are often compared with those of the Interstate Commerce Act dealing with unjust discrimination. But in their bearing upon private rights, they are wholly dissimilar. The latter Act imposes upon the carrier many duties; and it creates in the individual corresponding rights. For the violation of the private right it affords a private administrative remedy. It empowers any interested person deeming himself aggrieved to file, as of right, a complaint before the Interstate Commerce Commission; and it requires the carrier to make answer. Moreover, the complainant there, as in civil judicial proceedings, bears the expense of prosecuting his claim.[3] The Federal Trade Commission Act contains no such features.

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[2] The sole privilege conferred upon private persons is contained in the following provision of § 5: "Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the Commission, to intervene and appear in said proceeding by counsel or in person." 38 Stat. 719.

[3] Prior to the Act of June 18, 1910, c. 309, § 11, 36 Stat. 539, 550, which in terms conferred upon the Interstate Commerce Commission power to issue orders in proceedings initiated by it, orders were, with a few exceptions, entered only on complaints filed by shippers or others. Even after the Act of June 29, 1906, c. 3591, 34 Stat. 584, it was asserted that the Commission was without power to enter orders in proceedings initiated by it. Report of the House Committee on Interstate and Foreign Commerce, April 1, 1910, 61st Cong., 2d Sess., No. 923, pp. 3, 10; 45 Cong. Rec., Appendix, p. 88. Compare *In the Matter of Allowances for Transfer of Sugar,* 14 I. C. C. 619, 627. It had been stated earlier (*Interstate Commerce Com.* v. *Detroit, etc., Ry.*, 57 Fed. 1005, 1008) that the power existed; and its existence was assumed in *Interstate C. C.* v. *Northern Pacific R. Co.*, 216 U. S. 538, 542.

Both the United States Shipping Board Act of September 7, 1916, c. 451, § 22, 39 Stat. 728, 736, and the Packers and Stockyards Act of

While the Federal Trade Commission exercises under § 5 the functions of both prosecutor and judge, the scope of its authority is strictly limited. A complaint may be filed only "if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public." This requirement is not satisfied by proof that there has been misapprehension and confusion on the part of purchasers, or even that they have been deceived,—the evidence commonly adduced by the plaintiff in "passing off" cases in order to establish the alleged private wrong. It is true that in suits by private traders to enjoin unfair competition by "passing off," proof that the public is deceived is an essential element of the cause of action. This proof is necessary only because otherwise the plaintiff has not suffered an injury. There, protection of the public is an incident of the enforcement of a private right.[4] But to justify the Commission in filing a complaint under § 5, the purpose must be protection of the public.[5] The protection thereby afforded to private persons is the incident. Public interest may exist although the practice deemed unfair does not violate any private right. In *Federal Trade Commission* v. *Beech-Nut Packing Co.*, 257 U. S. 441, a practice was suppressed as being against public policy, although no private right either of a trader or of a purchaser appears to have been invaded. In *Federal Trade Commission* v. *Winsted*

August 15, 1921, c. 64, §§ 308, 309, 42 Stat. 159, 165, confer upon private individuals the right to institute proceedings and upon the administrative tribunal the power to award reparations.

[4] See *American Washboard Co.* v. *Saginaw Mfg. Co.*, 103 Fed. 281, 284–285; *Borden Ice Cream Co.* v. *Borden's Condensed Milk Co.*, 201 Fed. 510, 513; *Rosenberg Bros. & Co.* v. *Elliott*, 7 F. (2d) 962, 965; Nims, Unfair Competition (Third edition) pp. 27–36.

[5] See *Royal Baking Powder Co.* v. *Federal Trade Commission*, 281 Fed. 744, 752; *Federal Trade Commission* v. *Balmé*, 23 F. (2d) 615, 620; *Indiana Quartered Oak Co.* v. *Federal Trade Commission*, 26 F. (2d) 340, 342.

Hosiery Co., 258 U. S. 483, an unfair practice was suppressed because it affected injuriously a substantial part of the purchasing public, although the method employed did not involve invasion of the private right of any trader competed against.

In determining whether a proposed proceeding will be in the public interest the Commission exercises a broad discretion. But the mere fact that it is to the interest of the community that private rights shall be respected is not enough to support a finding of public interest. To justify filing a complaint the public interest must be specific and substantial. Often it is so, because the unfair method employed threatens the existence of present or potential competition. Sometimes, because the unfair method is being employed under circumstances which involve flagrant oppression of the weak by the strong. Sometimes, because, although the aggregate of the loss entailed may be so serious and widespread as to make the matter one of public consequence, no private suit would be brought to stop the unfair conduct, since the loss to each of the individuals affected is too small to warrant it.[6]

The alleged unfair competition here complained of arose out of a controversy essentially private in its nature. The practice was persisted in largely out of hatred and malice engendered by Sammons' act. It is not claimed that the article supplied by Klesner was inferior to that

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[6] Compare *Federal Trade Commission* v. *Beech-Nut Co.*, 257 U. S. 441; *Federal Trade Commission* v. *Pacific Paper Assn.*, 273 U. S. 52; *Wholesale Grocers' Ass'n* v. *Federal Trade Commission*, 277 Fed. 657; *Southern Hardware Jobbers' Ass'n* v. *Federal Trade Commission*, 290 Fed. 773; *Oppenheim, Oberndorf & Co., Inc.*, v. *Federal Trade Commission*, 5 F. (2d) 574; *Toledo Pipe-Threading Mach. Co.* v. *Federal Trade Commission*, 11 F. (2d) 337; *Cream of Wheat Co.* v. *Federal Trade Commission*, 14 F. (2d) 40; *Arkansas Wholesale Grocers' Ass'n* v. *Federal Trade Commission*, 18 F. (2d) 866; *Kobi Co.* v. *Federal Trade Commission*, 23 F. (2d) 41.

of Sammons, or that the public suffered otherwise financially by Klesner's use of the words "Shade Shop." It is significant that the complaint before the Commission was not filed until after the dismissal, in 1920, of a suit which had been brought by Sammons in 1915, in the Supreme Court of the District, to enjoin Klesner's use of the words "Shade Shop." [7] When the Commission directed the filing of the complaint Hooper & Klesner had been using those words in its business for five years. They had been used for nearly seven years before the order here in question was made; and for nearly nine years before this suit to enforce it was begun. Whatever confusion had originally resulted from Klesner's use of the words must have been largely dissipated before the Commission first took action. If members of the public were in 1920, or later, seriously interested in the matter, it must have been because they had become partisans in the private controversy between Sammons and Klesner.

The order here sought to be enforced was entered upon a complaint which had in terms been authorized by a resolution of the Commission. The resolution declared, in an appropriate form, both that the Commission had reason to believe that Klesner was violating § 5, and that it appeared to the Commission that a proceeding by it in respect thereof would be to the interest of the public. Thus, the resolution was sufficient to confer upon the Commission jurisdiction of the complaint. Section 5 makes the Commission's finding of facts conclusive, if supported by evidence. Its preliminary determination that

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[7] The original rule to show cause issued in the action was dismissed by the Supreme Court of the District on the 23rd day of December, 1915, "upon consideration of the Bill of Complaint, the exhibits thereto, and the rule to show cause issued thereon, and the answer and exhibits to said rule, as well as the arguments of counsel thereon." No further proceedings were had in the action until its final dismissal on May 24, 1920.

institution of a proceeding will be in the public interest, while not strictly within the scope of that provision, will ordinarily be accepted by the courts. But the Commission's action in authorizing the filing of a complaint, like its action in making an order thereon, is subject to judicial review. The specific facts established may show, as a matter of law, that the proceeding which it authorized is not in the public interest, within the meaning of the Act. If this appears at any time during the course of the proceeding before it, the Commission should dismiss the complaint. If, instead, the Commission enters an order, and later brings suit to enforce it, the court should, without enquiry into the merits, dismiss the suit.

The undisputed facts, established before the Commission, at the hearings on the complaint, showed affirmatively the private character of the controversy. It then became clear (if it was not so earlier) that the proceeding was not one in the interest of the public; and that the resolution authorizing the complaint had been improvidently entered. Compare Gerard C. Henderson, *The Federal Trade Commission,* pp. 52–54, 174, 228–229, 337. It is on this ground that the judgment dismissing the suit is *Affirmed.*

SANITARY REFRIGERATOR COMPANY *v.* WINTERS ET AL.

WINTERS ET AL. *v.* DENT HARDWARE COMPANY.

CERTIORARI TO THE CIRCUIT COURTS OF APPEALS FOR THE SEVENTH AND THIRD CIRCUITS, RESPECTIVELY.

Nos. 4 and 14. Argued April 19, 22, 1929.—Decided October 14, 1929.

1. On writs of certiorari to review contrary decisions of two Circuit Courts of Appeals on whether a patent was infringed by a particular device, the plaintiff being the same in both cases and the

defendant in one assuming defense of the other, this Court has no occasion to determine the validity of the patent claims involved, where, in the courts below, the defense conceded their validity if limited to the specific structure disclosed, and where their validity was upheld in one case, not denied in the other, and not questioned by the defense in its petition for certiorari. P. 34.

2. A decree of a Circuit Court of Appeals affirming an interlocutory order of the District Court adjudging the infringement of a patent and ordering an accounting, will not avail the patentee by way of *res judicata* or estoppel in a like suit pending before the Circuit Court of Appeals of another Circuit if not set up in the record of that case, but merely brought to the court's attention on argument. P. 35.
3. In such case, the effect of the decree is, at most, that which it may have under the doctrine of comity; refusal to follow it is not in itself a ground for reversal. *Id.*
4. Where there are concurrent findings of the two federal courts in one circuit that a patent has been infringed, and concurrent findings of those courts in another circuit, in a like case, that it has not, this Court, upon a review of both cases because of the conflict, will consider independently which of the decisions is correct. P. 35.
5. Upon the undisputed evidence in these cases the question of infringement resolves itself into a question of law, depending upon a comparison between the structure disclosed on the face of the plaintiff's patent and the device complained of, and the correct application thereto of the law of equivalency. P. 36.
6. Patent No. 1,385,102 (Claims 1–4, inclusive, and 7), issued to Winters and Crampton for an improved latch of the swinging lever type particularly adapted for use on doors of refrigerators, etc., is infringed by the defendants' latches, manufactured under Patent No 1,575,647, issued to Schrader. P. 41.
7. A close copy which seeks to use the substance of the invention, and, although showing some changes in form and position, uses substantially the same devices, performing precisely the same offices with no change in principle, constitutes an infringement. P. 42.
8. Even where, in view of the state of the art, the invention must be restricted to the form shown and described by the patentee and cannot be extended to embrace a new form which is a substantial departure therefrom, it is nevertheless infringed by a device in which there is no substantial departure from the description in the patent, but a mere colorable departure therefrom. P. 42.

9. Undisputed facts clearly showing infringement by a device made under a later patent, *held* not to be overcome by any presumption of the validity of that patent. P. 43.

24 F. (2d) 15, affirmed.

28 F. (2d) 583, reversed.

CERTIORARI, 278 U. S. 587, to review two decrees of different Circuit Courts of Appeals in suits for infringements of a patent. In No. 4 the court below sustained a District Court decree of injunction and for an accounting. In No. 14 the court below affirmed a District Court decree dismissing the bill because of non-infringement. See 20 F. (2d) 671.

Mr. E. Hayward Fairbanks for Sanitary Refrigerator Company and Dent Hardware Company.

Messrs. Frank E. Liverance, Jr., and *John Boyle, Jr.*, for Winters and Crampton.

MR. JUSTICE SANFORD delivered the opinion of the Court.

These are two suits in equity relating to letters patent No. 1,385,102 for improvements in latches, issued to Winters and Crampton July 19, 1921. They were heard together here. The invalidity of the two general claims of the patent, 5 and 6, has been conceded, and the issues here are limited to the five specific claims, 1, 2, 3, 4, and 7.

In No. 4—hereinafter referred to as the Sanitary case—Winters and Crampton brought suit in the Eastern District of Wisconsin against the Sanitary Refrigerator Co. for infringement of the patent by the latch which it used in the manufacture of refrigerators. The Dent Hardware Co., which had manufactured and sold the latches to the Refrigerator Co., although not itself a party to the suit, employed counsel and conducted the defense of the suit at its own expense. The District Court, after a

hearing on pleadings and proof, held that the patent was valid and infringed, enjoined further infringement and ordered an accounting. On appeal to the Circuit Court of Appeals for the Seventh Circuit, the defendant admitted the validity of the five specific claims, "accompanied by the statement that validity was recognized only in view of an asserted construction which gave to each so narrow a field that infringement was not disclosed." The court, finding that the sole issue remaining was one of the infringement of these claims, held that, while they were extremely narrow and were restricted to the particular structure disclosed, they had some range of equivalency and were infringed by the defendant's latch; and affirmed the decree of the District Court in respect to them. 24 F. (2d) 15.

In No. 14—hereinafter referred to as the Dent case—Winters and Crampton, after the decree of the District Court in the Sanitary case but before that of the Circuit Court of Appeals, brought a suit for infringement in the Eastern District of Pennsylvania against the Dent Hardware Co., the manufacturer of the refrigerator latches. The District Court, on final hearing, held that as to the five specific claims the question was not as to their validity but as to their scope, there being in effect no denial of the plaintiff's right to the specific construction described, and that these claims should be so read as to restrict their right to the specific construction and were not infringed by the defendant's latches; and dismissed the bill of complaint. On appeal to the Circuit Court of Appeals for the Third Circuit, the defendant again conceded that the five claims "were valid if limited to the specific structure disclosed," but claimed that, when so limited, it did not infringe. The court, while it had grave doubt as to the validity of these claims, finding that, if valid, their scope was clearly confined to the structural design dis-

closed and had only a narrow range of equivalency—and not agreeing with the opinion of the Circuit Court of Appeals in the Sanitary case, which meanwhile had been handed down—held that they were not infringed by the Dent latch; and affirmed "the decree of the District Court, dismissing the bill because of noninfringement." 28 F. (2d) 583.

There being a conflict of opinion between the two Circuit Courts of Appeals on the question of infringement, writs of certiorari were thereafter granted in both cases.[1]

1. Since both courts in the Sanitary case held the five specific claims to be valid, and neither court in the Dent case held them to be invalid, and the Hardware Co. in defending for the Refrigerator Co. in the Sanitary case and for itself in the Dent case, admitted in both Circuit Courts of Appeals that these claims were valid if limited to the specific structure disclosed, we have no occasion here to determine the question as to the validity of these claims when thus limited; especially as the petition for certiorari in the Sanitary case did not question the decree of the Circuit Court of Appeals for the Seventh Circuit in respect to the validity of these claims, but assigned as error merely its holding in reference to the question of infringement and was based solely on the conflict between the two circuits in respect to that question.[2]

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[1] In the Sanitary case the petition for the writ of certiorari was filed before the decree of the Circuit Court of Appeals for the Third Circuit in the Dent case had been handed down; and was then denied. 278 U. S. 599. But after the handing down of that opinion, showing the conflict as to the question of infringement, was brought to our attention by a petition for rehearing, the certiorari was granted. 278 U. S. 587. However, the Refrigerator Co. did not challenge the correctness of the holding of the Circuit Court of Appeals for the Seventh Circuit that the five specific claims were valid; and the petition was based entirely on the conflict of opinion as to the question of infringement.

[2] See Note 1, *supra*.

2. Nor have we occasion here to consider at length whether, as urged by Winters and Crampton, the decree of the Circuit Court of Appeals for the Seventh Circuit affirming the interlocutory order of the District Court adjudging the infringement and ordering an accounting, finally and conclusively determined the question of infringement so as to become binding upon the Circuit Court of Appeals for the Third Circuit. The bill in the Dent case was filed before the judgment of the Circuit Court of Appeals for the Seventh Circuit had been rendered. This judgment was not set up by Winters and Crampton in the Dent case by any amendment to the pleadings; nor was it even introduced in evidence in that case. In short, there is nothing in the record in that case to raise the defense of *res judicata* or estoppel by judgment; and the only effect of the decree in the Seventh Circuit when called to the attention of the Circuit Court of Appeals for the Third Circuit in argument was, at most, that which it had under the doctrine of comity, constituting a rule, not of law, but of practice, convenience and expediency; and if we thought the action of the Circuit Court of Appeals for the Third Circuit "correct upon the merits, we should not reverse its action" though we were of opinion it had not given sufficient weight to that doctrine. See *Mast, Foos & Co.* v. *Stover Mfg. Co.*, 177 U. S. 485, 488.

3. This brings us to the question brought up for review by the writs of certiorari, as to whether the five specific claims of the Winters and Crampton patent were infringed by the refrigerator latches manufactured by the Dent Hardware Co. and used by the Refrigerator Co.

So far as this question is concerned there is no substantial difference in the evidence in the two cases. As there was a concurrent finding in the two lower courts in the Sanitary case that they were infringed, and a concurrent finding in the two lower courts in the Dent case that they

were not infringed, and the cases have been brought here because of the conflict of decision in the two Circuit Courts of Appeals, it is clear that under these circumstances, neither properly calls for the strict application of the general rule as to the acceptance by this Court of the concurrent findings of the lower courts on questions of fact, and we consider independently the question as to which of the decisions on this question is based upon the sounder reasoning and is correct. Compare *Thomson Co.* v. *Ford Motor Co.*, 265 U. S. 445, 447; *Concrete Appliances Co.* v. *Gomery*, 269 U. S. 177, 180. Furthermore upon the undisputed evidence the question of infringement resolves itself in each case into one of law, depending upon a comparison between the structure disclosed on the face of the patent and the device shown in the Dent latch, and the correct application thereto of the rule of equivalency. Compare *Singer Company* v. *Cramer*, 192 U. S. 265, 275.

4. In the application for their patent Winters and Crampton said: "This invention relates to a latch of the swinging lever type, particularly adapted for use on refrigerators though applicable in many other relations where a door is to be closed and held in closed position. The swinging lever latch . . . is pivotally connected at one end to the door jamb or casing, allowing the door to be opened when the latch is thrown to an upper vertical position, and coming down across the meeting edges of the casing and door when swung to horizontal position, engaging with a cam member on the door to wedge the door tightly shut. This latch is a very serviceable latch but . . . is liable to drop to horizontal position in which case the door cannot be closed without first raising the lever to upper vertical position while, many times, the door is inadvertently swung toward closed position and against the lever in its horizontal position with injury either to the lever or door or both. In the present inven-

tion, it is a primary object and purpose to provide a latch which may be pivotally connected to the door and which is automatically operated to engage with a retaining member or keeper fixed on the door casing when the door is closed irrespective of the vertical or horizontal position of the latch lever, working as well in the one case as the other. A further object of the invention is to construct a latch of few parts, whereby it may be economically made and which will be durable and efficient in service. . . . The ability to close the door and latch it automatically, irrespective of the position of the latch lever insures against injury to the latch or door and also insures that the door will be latched when it is swung shut."

Claims 1 and 7, which are typical, read as follows:

"1. In combination, a door and a casing therefor, a keeper attached to the casing comprising a base, an outstanding post and a head at the outer portion of the post, said head depending below the post and formed with upper and lower curved outer sides coming substantially to a point and with an inner upwardly and inwardly inclined side, a member attached to the door comprising a base, an integral outstanding post projecting from the base and a laterally extending arm at the upper end of the post paralleling the base, and a latch lever pivotally mounted between its ends between the said arm and base of said member, said lever having one arm formed with an under cam side extending from the pivot and adapted to be engaged under the depending portion of the keeper, a handle portion extending in the opposite direction from the pivot and another arm projecting from the handle portion a distance from the pivot and lying substantially at right angles to the first arm of the lever and likewise being formed with an inner cam side, substantially as and for the purposes described.

"7. In combination, a door and a casing therefor, a keeper attached to the casing, a latch lever pivotally

mounted on the door between its ends, one end of the lever being formed into an operating handle and the other into a keeper engaging arm, a second arm projecting from the handle portion of the lever a short distance from its pivot and at an angle to the first arm, said keeper being formed at its outer sides for engagement with the respective arms when the lever is in horizontal and vertical positions, respectively, as the door is closed, to automatically operate the lever so that it will engage under the keeper when the door is entirely closed, substantially as described."

We insert here reproductions (on a reduced scale) of Figure 4 of the drawings which is a front elevation showing the door approaching closed position with the swinging lever in vertical relation to the door; Figure 5, a side elevation thereof; Figure 6, a front elevation showing the action on the swinging lever as the door approaches closed position after the lever has been in horizontal position; and Figure 1, a front elevation showing the latch in closed position and holding a door closed. These show the patented device in detail.

The operation of closing and latching the door is thus described in the specification:

"When the door is moved toward closing position with the lever vertically located, the cam side 13 of arm 12 strikes against the curved upper side 18 of head 17, causing the lever to be automatically swung toward the horizontal, and bringing the arm 9 into place so as to pass under the lower point of the keeper head so that it may engage at its outer side against the wedging cam side 20 of the head. It is apparent that by giving the end of handle 11 a downward movement, the door will be wedged tightly shut as the arm 9 moves upwardly and against the incline 20. . . . If the lever has dropped to horizontal position while the door is open, the closure of the door and engagement of the lever with the keeper is accomplished by merely swinging the door shut, in which case, as shown in Figs. 6

and 7, the arm 9 strikes with its inclined cam side 10 against the lower curved side 19 of the head 17 of the keeper, causing the handle to be automatically turned toward vertical position. This movement continues until the arm 9 passes by the lower point of the keeper head 17 or, as usually occurs, the arm 12 comes into contact with the head at the upper side 18, whereupon the lever is actu-

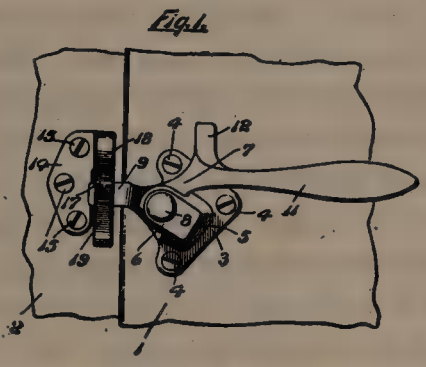

Fig. 1.

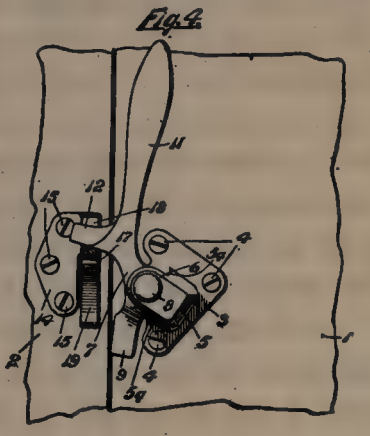

Fig. 4.

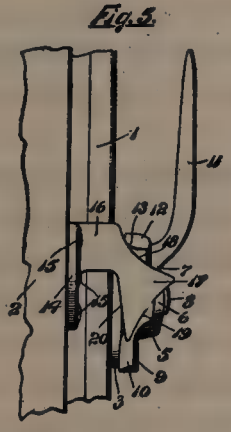

Fig. 5.

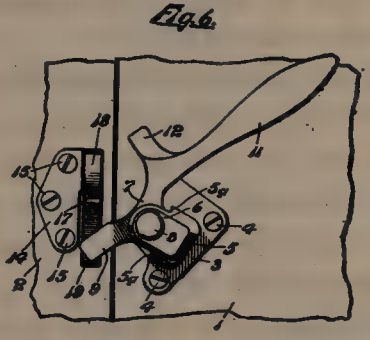

Fig. 6.

ated so as to bring the arm 9 under the depending portion of the keeper, the same as before described when closing the door with the lever in vertical position. In any case, the latch lever engages with the latch keeper when the door is closed irrespective of the position of the lever."

While this patent came into a prior art crowded with various latch devices for holding a door in closed position

when it was shut and was not a pioneer patent entitled to a broad range of equivalents, the structure which it disclosed was meritorious and soon attained a large measure of commercial success.

5. The Dent latch is manufactured under letters patent No. 1,575,647 for lock devices for refrigerator doors issued March 9, 1926 to T. O. Schrader, assignor of the Hardware Co. In his application for this patent Schrader said: "I am aware of [Winters and Crampton] patent No. 1,385,102 dated July 19, 1921, and I disclaim the structure therein disclosed, as my invention is differentiated therefrom, since whereas the structure disclosed in said patent utilizes a pin 12 carried by the latch arm 11, which coacts with an upper cam edge 18 of the keeper member 17; in my novel construction the upper edge of my keeper plate b^3 has no function, but the pivotal latch c^6 carries a cam c^1 inclined to the pivot of said latch and adapted to coact with a pin b^8 carried by and laterally projecting from, the inner wall of the keeper plate b^3 thereby to swing the terminal tongue of the latch into the horizontal locking position; and to none of the constructions of the prior art do I herein make claim."

The latch manufactured by the Hardware Co. which is involved in both these cases, differs only slightly in form from that shown in the Schrader patent. It is in the main an exact reproduction of the structure disclosed in the Winters and Crampton patent. It has like it a keeper attached to the door casing, with a triangular head, and a lever latch with a handle and two arms whose functions are to trip or give a kick to the latch lever by their coaction with the keeper head, and wedge the lower arm under it, regardless of the position of the latch lever when the closing operation begins. The only differences are that in the Dent latch the keeper has on the inner or door side of the triangular head a lug projecting inwardly towards the latch lever; and the upper arm of the latch lever is a short

inclined cam placed at the pivot of the latch lever, and so constructed and at such an angle that it rides upon and contacts with the lug on the side of the keeper head, instead of with its upper curved side as in the Winters and Crampton structure. The coaction of this shortened arm with the lug operates, however, on the cam principle, just as the coaction of the longer upper arm with the curved upper surface of the keeper head in the Winters and Crampton structure, to trip or kick the lower arm of the latch lever into the wedged position under the keeper head.

6. Despite the changes in the Dent latch from the Winters and Crampton structure we find that the two devices are substantially identical, operating upon the same principle, and accomplishing the same result in substantially the same way, and that the slight change in the form of the Dent latch is merely a colorable departure from the Winters and Crampton structure.

In the Dent latch, as stated by the Circuit Court of Appeals for the Seventh Circuit, the lug on the inner side of the triangular head of the keeper is a part of the side of the head. And at the place where the shortened upper arm of the latch lever comes in contact with it, the surface of this lug forms in effect the upper side of the keeper head as a substitute for the upper side in the Winters and Crampton structure, which, while left in place, performs no function whatever, just as if it were cut away.

Although the claims of the Winters and Crampton patent are limited to the structure therein disclosed, we find that they are infringed by the device of the Dent latch. Both Circuit Courts of Appeals recognized that the Winters and Crampton patent, although thus limited had some range of equivalents; and we think that, though it be a narrow one, it is sufficient.

There is a substantial identity, constituting infringement, where a device is a copy of the thing described

by the patentee, "either without variation, or with such variations as are consistent with its being in substance the same thing." *Burr* v. *Duryee,* 1 Wall. 531, 573. Except where form is of the essence of the invention, it has little weight in the decision of such an issue; and, generally speaking, one device is an infringement of another "if it performs substantially the same function in substantially the same way to obtain the same result. . . . Authorities concur that the substantial equivalent of a thing, in the sense of the patent law, is the same as the thing itself; so that if two devices do the same work in substantially the same way, and accomplish substantially the same result, they are the same, even though they differ in name, form, or shape." *Machine Co.* v. *Murphy,* 97 U. S. 120, 125. And see *Elizabeth* v. *Pavement Co.,* 97 U. S. 126, 137. That mere colorable departures from the patented device do not avoid infringement, see *McCormick* v. *Talcott,* 20 How. 402, 405. A close copy which seeks to use the substance of the invention, and, although showing some change in form and position, uses substantially the same devices, performing precisely the same offices with no change in principle, constitutes an infringement. *Ives* v. *Hamilton,* 92 U. S. 426, 430. And even where, in view of the state of the art, the invention must be restricted to the form shown and described by the patentee and cannot be extended to embrace a new form which is a substantial departure therefrom, it is nevertheless infringed by a device in which there is no substantial departure from the description in the patent, but a mere colorable departure therefrom. Compare *Duff* v. *Sterling Pump Co.,* 107 U. S. 636, 639.

The fact that, as the Dent device makes two reciprocal changes in the form of the Winters and Crampton structure, one by the insertion of the lug on the keeper head, and the other in the shortened upper arm of the latch

lever, and one alone of these changes cannot be substituted in the Winters and Crampton structure without the other, so as to make it operative, is plainly insufficient to avoid the infringement.

Nor is the infringement avoided, under the controlling weight of the undisputed facts, by any presumptive validity that may attach to the Schrader patent by reason of its issuance after the Winters and Crampton patent.

The decree of the Circuit Court of Appeals for the Seventh Circuit in the Sanitary case is affirmed; and the decree of the Circuit Court of Appeals for the Third Circuit in the Dent case is reversed.

No. 4 Affirmed.
No. 14 Reversed.

COLGATE, ADMINISTRATOR, *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 74. Jurisdictional Statement Submitted October 14, 1929.—Decided November 4, 1929.

Under a Special Jurisdictional Act aproved March 3, 1927, (44 Stat. 1807,) which referred back to the Court of Claims for rendition of a judgment certain findings of fact theretofore made by it and reported to Congress, and provided for an "appeal" to this Court by either party "upon or from any conclusion of law or judgment, from which appeals now lie in other cases," the review intended was the usual method of review at the date of the Special Act, which was and is by application for a writ of certiorari, and not a technical appeal. P. 45.

APPEAL under a Special Jurisdictional Act from a judgment for the Government rendered by the Court of Claims on a claim against the United States for alleged patent infringement. A petition for certiorari had been denied. See *post*, p. 553.

Messrs. George A. King, Louis Titus, and *C. Bascom Slemp* for Colgate.

Solicitor General Hughes and *Assistant Attorney General Galloway* for the United States.

MR. CHIEF JUSTICE TAFT delivered the opinion of the Court.

The judgment of the Court of Claims, now under consideration, was given on a claim against the United States for alleged patent infringement, and was entered on February 4, 1929. A petition for certiorari seeking review in this Court was filed May 1, 1929, and was denied on October 14, 1929. The Government contends that both methods of review, either by appeal or certiorari, in this Court are now without avail.

The claim was referred by the Senate to the Court of Claims for an advisory finding and report of the material facts. A hearing was had in the Court of Claims and it reported its findings on the questions of fact. Thereafter the Court of Claims re-heard the case under a special Jurisdictional Act of Congress approved March 3, 1927, (44 Stat. c. 408, Part 3, p. 1807,) which read as follows:

"That the findings of fact made by the Court of Claims in the case of Arthur E. Colgate, administrator of the estate of Clinton G. Colgate, deceased, against the United States, Congressional, Numbered 6063, Senate Document Numbered 703, Sixty-fourth Congress, second session, be, and they are hereby, referred back to the Court of Claims with jurisdiction to render such judgment as the findings of fact heretofore found and the law require: *Provided,* That either party hereto may appeal to the Supreme Court of the United States upon or from any conclusion of law or judgment, from which appeals now lie in other cases, at any time within ninety days after the rendition of judgment: *Provided further,* That the amount of any

such judgment shall not exceed the sum of $50,000: *And provided further,* That such notice hereof shall be given to the Attorney General of the United States as may be provided by orders of said court, and it shall be the duty of the Attorney General to cause one of his assistants to appear and defend for the United States."

Judgment for the Government in the re-heard case was given by the Court of Claims on February 4, 1929, based on a letter to the Commissioner of Patents under date of January 15, 1851, from Simpson, the then owner, specifically abandoning the application for the patent.

On April 23, 1929, Arthur Colgate, as administrator of Clinton Colgate, in pursuance of the Special Act, filed an application in the Court of Claims for the allowance of an appeal to this Court from the adverse judgment, and appeal was allowed by the Court of Claims on April 26, 1929. The appeal was docketed in this Court May 1, 1929, and on the same day a petition for a writ of certiorari was filed on the record in the appeal case. The petition for certiorari, as already said, was denied by us October 14th last. The case is now before us for consideration of the question of our jurisdiction upon the appeal.

We think the proper construction to be put upon this Special Act is that the review provided for was a petition for certiorari. One of the chief purposes of the General Act of February 13, 1925, ch. 229, 43 Stat. 936, was to abolish appeals from the Court of Claims to this Court and substitute therefor applications for writs of certiorari. The language of the Special Act is that "either party hereto may appeal to the Supreme Court of the United States upon or from any conclusion of law or judgment *from which appeals now lie in other cases.*" At the time of the passage of that Act, no appeals generally "lay in other cases" from the Court of Claims to this Court, and do not now. It was evidently intended by the Act of 1925 to make the method of review by this Court of judg-

ments of the Court of Claims, uniform. It was intended by the Act of 1925 to give this Court an opportunity to determine in advance whether the case was one worthy of review here. To hold that the case may come here only by certiorari is to make it conform to the general purpose of the Act of February 13, 1925, in enlarging the use of certiorari as a method of review in this Court. To describe appeals as from judgments "from which appeals now lie in other cases" is a mistake, unless one gives to the meaning of the word "appeals" something more than a mere technical meaning. If what was intended was an appeal in its technical significance as distinguished from certiorari, different words should have been used to indicate it. Therefore the Special Act must be construed to require that the review intended was the usual method of review at the date of the Special Act, which is and was by application for a writ of certiorari.

The case of *Sisseton and Wahpeton Band of Sioux Indians* v. *United States*, 277 U. S. 424, does not control the present case. That case had reference to another special act, granting the appellants one year from the date of the Act within which to appeal, and it was held to confer the right of appeal as distinguished from the right to petition for certiorari. That special act was approved March 4, 1927, (c. 522, 44 Stat., Part 3, p. 1847,) and its purpose was to revive a right to appeal to this Court given to the same appellants by the Act of April 11, 1916, (39 Stat. 47, c. 63,) but of which appellants had failed to avail themselves within the time limited therefor. Since Congress, by the 1927 Act, was merely extending the period for the exercise of a right conferred in 1916, the term "appeal," contained in the statute, was naturally construed with reference to its meaning at the time the right to it was originally granted. That was granted nearly nine years before the Act of February 13, 1925, changed the mode of

appellate review of judgments of the Court of Claims from a technical "appeal" to a petition for writ of certiorari.

These provisions with respect to special review of cases from the Court of Claims should be carefully construed. They are generally embodied in exceptional legislation considered by other committees than the judiciary committees, not especially advised as to the importance of uniformity in respect to such exceptions. It should therefore, be clear, if a departure from the ordinary methods of limitation of review is intended by Congress, that the language should leave no doubt about it.

The history of the legislation and the language used show that the reference to appeals in the Special Act now before us finds its counterpart in other Acts having the same purpose. The language is that "either party hereto may appeal to the Supreme Court of the United States upon or from any conclusion of law or judgment from which appeals now lie in other cases." Acts of this kind, although speaking of "appeals," show what is intended by the phrase, "as in other cases." The list of the later Acts in legislation of this kind, after the passage of the Act of February 13, 1925, is as follows:

Act of March 3, 1925, (c. 459, 43 Stat. 1133, 1134,) Kansas or Kaw Indians:

"From the decision of the Court of Claims . . . an appeal may be taken by either party *as in other cases* to the Supreme Court of the United States."

Act of May 14, 1926, (c. 300, 44 Stat. 555,) Chippewas of Minnesota:

"With the right of appeal to the Supreme Court of the United States by either party *as in other cases.*"

Act of July 2, 1926, (c. 724, 44 Stat. 801,) Citizen Band of Pottawatomies:

"With the right of appeal to the Supreme Court of the United States by either party *as in other cases.*"

Act of December 17, 1928, (c. 36, 45 Stat. 1027,) Winnebago tribe:

"With the right of appeal to the Supreme Court of the United States by either party *as in other cases.*"

Act of February 28, 1929, (c. 377, 45 Stat. 1407,) Shoshone tribe:

"That from the decision of the Court of Claims in any suit prosecuted under the authority of this Act an appeal may be taken by either party, *as in other cases,* to the Supreme Court of the United States."

Act of July 3, 1926, (c. 734, 44 Stat. 807,) Crow Indians:

"With right of appeal to the Supreme Court of the United States by either party."

Act of March 2, 1927, (c. 250, 44 Stat. 1263,) Assiniboine Indians:

"With right of appeal to the Supreme Court of the United States by either party."

Act of March 3, 1927, (c. 302, 44 Stat. 1349,) Shoshone Indians:

"With right of appeal to the Supreme Court of the United States by either party."

Act of May 18, 1928, (c. 624, 45 Stat. 602,) Indians of California:

"With the right of either party to appeal to the Supreme Court of the United States."

Act of February 20, 1929, (c. 275, 45 Stat. 1249,) Nez Perce tribe:

"With the right of appeal by either party to the Supreme Court of the United States."

Act of February 23, 1929, (c. 300, 45 Stat. 1256,) Coos (Kowes) Bay, Lower Umpqua and Siuslaw tribes:

"And the right of appeal to the Supreme Court of the United States is hereby granted to both parties."

Here are included five instances in which the expression used describing the appeal is as one which would "lie in

other cases," and the whole course of the legislation indicates a desire that the same appellate review should be given as in other cases. We think that this customary language requires the uniform use of the writ of certiorari in order to secure that which a certiorari gives—a preliminary examination of proceedings by this Court before review. Unless a special reason in the Act providing for appellate review indicates that the review is to be by technical appeal rather than by the ordinary method of certiorari, the latter method is the right one. This must lead to the dismissal of the present appeal.

Appeal dismissed.

WHEELER *v.* GREENE, RECEIVER OF THE BANKERS JOINT STOCK LAND BANK OF MILWAUKEE.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 39. Argued October 22, 23, 1929.—Decided November 4, 1929.

The Federal Farm Loan Board has no power to levy an assessment, nor may a receiver appointed by it maintain suit, for the enforcement of the stockholders' liability created by the Federal Farm Loan Act. P. 52.

29 F. (2d) 468, reversed.

CERTIORARI, 279 U. S. 829, to review a judgment of the Circuit Court of Appeals, which reversed a decision of the District Court sustaining a demurrer to a declaration in a suit brought against a stockholder of a Joint Stock Land Bank, by its receiver, to collect an assessment levied by the Federal Farm Loan Board.

Messrs. Floyd E. Thompson and *Joseph V. Quarles*, with whom *Messrs. Conrad H. Poppenhusen, Lawrence*

A. Cole, and *Henry J. Darby* were on the brief, for petitioner.

Mr. Edwin S. Mack, with whom *Messrs. Arthur W. Fairchild* and *J. Gilbert Hardgrove* were on the brief, for respondent.

Mr. Dean G. Acheson, on behalf of *Messrs. Lyman M. Bass* and *Porter R. Chandler,* filed the brief of the Stockholders' Protective Committee of the Kansas City Joint Stock Land Bank, as *amicus curiae,* by special leave of Court.

Mr. Justice Holmes delivered the opinion of the Court.

The plaintiff is the receiver of the Bankers Joint Stock Land Bank of Milwaukee appointed by the Federal Farm Loan Board. The defendant is a holder of stock of that Bank. This suit is brought to collect an assessment equal in amount to the par value of the defendant's stock, which was levied by the Federal Farm Loan Board and which the plaintiff was ordered to collect. The defendant demurred to the declaration that alleged these facts. The District Court sustained the demurrer and ordered judgment for the defendant. The plaintiff appealed and the judgment was reversed by the Circuit Court of Appeals. 29 F. (2d) 468. A writ of certiorari was granted by this Court to settle the question whether the Federal Farm Loan Board had power to levy an assessment, or the receiver to maintain suit, for the enforcing of the stockholders' liability created by the Federal Farm Loan Act, July 17, 1916, c. 245, § 16; 39 Stat. 374. U. S. Code, Title 12, § 812.

The section (§ 29, Code, §§ 961, 963,) of the Federal Farm Loan Act that deals with insolvency of farm loan associations and joint stock land banks provides for the appointment of a receiver by the Farm Loan Board and

states his duties and powers. It closely follows the words of the earlier National Bank Act, R. S. § 5234; Code, Tit. 12, § 192, stating the duties of the receiver of a bank that has refused to pay its circulating notes, and giving him power to take possession of books and assets and to collect debts, &c. But whereas the Bank Act goes on "and may, if necessary to pay the debts of such association, enforce the individual liability of the stockholders," the Farm Loan Act stops short and has no such words. When so important a grant of power contained in the prototype is left out from the copy it is almost impossible to attribute the omission to anything but design, or to believe that it left to very attenuated implications what the model before it so clearly expressed.

There is a plain reason for the difference. The national banks issue notes that constitute an important part of the currency of the country and that the United States has an interest in seeing paid. It is upon the bank's refusal to pay these notes that the Comptroller of the Currency is to appoint a receiver, and the authority to enforce the stockholder's liability adds a security to the national circulation that is of national scope. But the Joint Stock Land Banks issue no such notes. They are created to make loans on farm mortgages to members of an association in a territorially limited district, and are relatively local affairs. It is contemplated that the bonds that they issue shall be secured by mortgages. There is not the same need that the stockholder's liability should be summarily disposed of behind his back in Washington (*Rankin* v. *Barton,* 199 U. S. 228, 232; *Casey* v. *Galli,* 94 U. S. 673, 681,) rather than by the usual proceeding of a bill in equity which is brought in the neighborhood, in which the stockholder can be heard, and by which the assessment instead of one hundred per cent. can be adjusted to the specific case. *Terry* v. *Tubman,* 92 U. S. 156. The stockholders are to be held only "equally and ratably."

And, to say the least, the bill in equity is the most likely way of reaching that result.

The establishment in Washington of a bureau "charged with the execution of this Act, . . . under the general supervision of a Federal Farm Loan Board," c. 245, § 3; Code, § 651, and the putting of the administration of the Act under the direction and control of that Board by § 1, seem to us inadequate to supply the omission of this power from the express statement of what the Board and receiver may do when the bank is insolvent. The receiver had power to collect the assets of the bank, but the liability of stockholders is no part of those assets. It is a liability to creditors which the creditors may be left to enforce.

Decree reversed.

INTERSTATE COMMERCE COMMISSION *v.* UNITED STATES EX REL. LOS ANGELES.

CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 54. Argued October 28, 29, 1929.—Decided November 25, 1929.

1. Power to compel interstate railway carriers to abandon their existing passenger stations and terminals in a large city and erect in lieu a new union station at a new site, is not conferred upon the Interstate Commerce Commission by paragraphs 18–21 of § 1 of the amended Interstate Commerce Act, giving the Commission authority over abandonments and extensions of lines, or by paragraphs 3 and 4 of § 3, requiring carriers to afford all reasonable, proper, and equal facilities for interchange of traffic and authorizing the Commission in certain circumstances to require that terminal facilities of one carrier may be used by another. *Railroad Commission* v. *Southern Pacific Co.*, 264 U. S. 331, distinguished. P. 67.

2. Whether power exists to control the Interstate Commerce Commission by mandamus need not be decided in the absence of a meritorious case. P. 71.

34 F. (2d) 228, reversed.

CERTIORARI, 279 U. S. 830, to review a judgment of the Court of Appeals of the District of Columbia, which reversed a judgment of the Supreme Court of the District dismissing a petition for a writ of mandamus.

Mr. Daniel W. Knowlton for the Interstate Commerce Commission.

Since exercise of a power to compel establishment of new union stations in lieu of existing individual stations would vitally affect local interests and would encroach upon authority heretofore exercised by the States, the lower court's decision is in square conflict with the settled rule that federal legislation trenching on state authority must be strictly construed. That decision rests, not on express language conferring such power, but upon various inapt provisions added by the Transportation Act of 1920, or upon provisions of uncertain scope in the early Act, originally put there, and re-enacted in 1920, without thought of conferring any such authority.

The decision of this Court in the Los Angeles Station case, (264 U. S. 331,) that the Commission has "means of control over installation of such new station" in that its permission for incidental extensions and abandonments of lines and for issuance of new securities, if needed, must first be obtained, manifests that the Commission's authority is indirect and restrictive and that it is not an authority to order the building of new union stations.

The conferring by Congress of a permissive and restrictive authority in this field is in line with its past

policy, which has customarily been to give to the Commission a limited power only in the first instance, and, in enlarging it later, to employ express and unmistakable language, including specific provisions for notifying and according hearing to the States, or for securing their cooperation; it is also in harmony with the general Congressional plan of the 1920 amendments (particularly as evidenced by the consolidation provisions of the Act), to give to the Commission permissive and restrictive authority, rather than a compulsory authority, over subject-matter intimately affecting local interests, or constituting extensive invasions into a field theretofore left to private initiative and managerial discretion, whenever power of that character was fitted to accomplish the end in view.

If it should be considered that the State has been altogether excluded and is without power to order installation of the new union station, even after obtaining this Commission's certificates in respect of relocation of main line track, still this Commission's mere indirect and restrictive authority to prevent a change in existing status would not be thereby changed into a mandatory power to force new union stations in lieu of existing stations upon the carriers and the cities.

Citing: *Savage* v. *Jones*, 225 U. S. 501; *United States* v. *Pennsylvania R. Co.*, 242 U. S. 208; *Kentucky & I. B. Co.* v. *L. & N. R. Co.*, 37 Fed. 567; *Alabama R. Co.* v. *Jackson R. Co.*, 271 U. S. 244; Cong. Rec., Vol. 58, Pt. 9; *North Carolina Comm'n* v. *Southern Ry.*, 185 N. C. 435.

Railroad Comm'n v. *Southern Pacific Co.*, 264 U. S. 331, merely holds that the Commission's power to control action of the States in respect of union stations is of indirect character, resting chiefly upon its authority to prevent financial commitments that might impair the carriers' ability to perform their duties to the public. *Lehigh Valley R. Co.* v. *Board of Comm'rs*, 278 U. S. 24.

That Congress' entry into a new field has customarily been one of cautious approach, giving to the Commission only a limited power in the first instance, is borne out by many instances. *Houston & T. R. Co.* v. *United States*, 234 U. S. 342; *Wisconsin Comm'n* v. *C. B. & Q. R. Co.*, 257 U. S. 563; *Railroad Comm'n* v. *Southern Pacific R. Co.*, 264 U. S. 331; *Snyder* v. *N. Y. C. & St. L. R. Co.*, 118 Oh. St. 72.

Repeated decisions of this Court have commented upon the fact that the amendments made to the Act by the Transportation Act of 1920, effected marked departures from the earlier purposes of federal regulation. But this Court has recognized that the power conferred on the Commission by many of those amendments is only a power to permit or authorize, and not a mandatory power. *Dayton-Goose Creek R. Co.* v. *United States*, 263 U. S. 456; *Railroad Comm'n* v. *Southern Pacific R. Co.*, *supra*; *Chicago Junction Case*, 264 U. S. 258; *Venner* v. *Michigan C. R. Co.*, 271 U. S. 127; *New England Divisions Case*, 261 U. S. 184; *Snyder* v. *N. Y. C. & St. L. R. Co.*, 118 Oh. St. 72; *Texas* v. *East Texas R. Co.*, 258 U. S. 204; *Colorado* v. *United States*, 271 U. S. 153.

The doctrine of the *Winfield* case raises the question as to whether Congress may not have intended to supersede all state authority, despite the fact that it gave to the Commission only limited powers in the field. *New York Central R. Co.* v. *Winfield*, 244 U. S. 147; *Prigg* v. *Pennsylvania*, 16 Pet. 536; *Snyder* v. *N. Y., C. & St. L. R. Co.*, 118 Oh. St. 72.

Of course the holding in the Los Angeles Station Case, *supra* (*Railroad Comm'n* v. *Southern Pacific*) to the effect that the Commission's permissive order or certificate for relocation of main track " is a condition precedent to the validity of any action by the carriers or of any order by the State Commission " looking to the establishment of

the union station, indicates that the State has only been superseded to the extent expressly required by the terms of the Act, that is, that the State can still act after the Commission has passed upon and approved the changes in track and expenditure involved. And this is borne out by the legislative history of the 1920 amendments.

In the consolidation provisions of the Act, as in the case of new union stations, the subject matter contemplates co-operative action by separate individual companies. Congress gave to the Commission power to approve applications of the railroads for permission to effect consolidations, but no compulsory authority. *Snyder* v. *N. Y., C. & St. L. R. Co., supra.*

Messrs. Max Thelen and *Jess E. Stephens,* with whom *Messrs. Erwin P. Werner,* City Attorney of Los Angeles, *Milton Bryan,* Assistant City Attorney, and *Edwin C. Blanchard* were on the briefs, for the City of Los Angeles.

Prior to the enactment of the Transportation Act of 1920, the Railroad Commission of California had full power to order such a union passenger station. Constitution of California, Art. XII, §§ 22, 23; Public Utilities Act of California, Stats. 1915, p. 115, as amended, §§ 13 (b), 22 (a), 30, 31, and 36; *Civic Center Ass'n* v. *Railroad Comm'n,* 175 Cal. 441; *Atchison, T. & S. F. R. Co.* v. *Railroad Comm'n,* 190 Cal. 214. See *Railroad Comm'n* v. *Northern Alabama R. Co.,* 182 Ala. 357; *Railroad Comm'n* v. *Alabama G. S. R. Co.,* 183 Ala. 354; *Mayor* v. *Norwich & W. R. Co.,* 109 Mass. 103; *Dewey* v. *Atlantic C. L. R. Co.,* 142 N. C. 392; *Missouri O. & G. R. Co.* v. *State,* 29 Okla. 640; *State* v. *St. Louis S. W. R. Co.,* 165 S. W. 491; *Gulf, C. & S. F. R. Co.* v. *State,* 167 S. W. 192; *State* v. *St. Louis S. W. R. Co.,* 199 S. W. 829.

In *Railroad Commission* v. *Southern Pacific,* 264 U. S. 331, this Court decided the issue of the Commission's jurisdiction on the precise facts here under consideration.

Under that decision the Commission has full authority to grant the relief requested by the City of Los Angeles.

The power to direct the construction of a union passenger depot has always been held to carry with it as a necessary incident thereto the power to specify the site thereof. *Railroad Comm'n* v. *Alabama G. S. R. Co.*, 185 Ala. 354; *State* v. *St. Louis S. W. R. Co.*, 165 S. W. 491; *Gulf, C. & S. F. R. Co.* v. *State*, 167 S. W. 192.

Under paragraph 3 of § 3 of the Interstate Commerce Act, as amended, the Interstate Commerce Commission has jurisdiction to require the construction and operation of the union station. Under that paragraph it is the duty of carriers to afford all reasonable, proper and equal "facilities . . . for the receiving, forwarding and delivering of passengers . . . to and from their several lines and those connecting therewith. . ."

The word "facilities" includes depots and union depots. *Hastings Club* v. *Chicago, M. & St. P. R. Co.*, 69 I. C. C. 489; *St. Louis & S. F. R. Co.* v. *Miller*, 31 Okla. 801; *Missouri, O. & G. R. Co.* v. *State*, 29 Okla. 640.

The Interstate Commerce Commission itself assumed this in the *Los Angeles Passenger Terminal Cases*, 100 I. C. C. 421; s. c. 142 I. C. C. 489. In the Los Angeles Union Depot Case, 264 U. S. 331, the Court decided that this same word, "facilities," as used in the very next paragraph of the Act, includes a "union station or depot."

Under paragraph 3 of § 3, it is the duty of carriers, in a proper case, to construct and operate a union passenger station. The Commission has power to enforce compliance with this duty. Distinguishing *United States* v. *Pennsylvania R. Co.*, 242 U. S. 208. See *People ex rel. N. Y. C. R. Co.* v. *Service Comm'n*, 233 N. Y. 113, certiorari denied, 258 U. S. 621; *Lake Erie, A. & W. R. Co.* v. *Utilities Comm'n*, 109 Oh. St. 103; *Atchison, T. & S. F. R. Co.* v. *Railroad Comm'n*, 190 Cal. 214, affirmed in 264 U. S. 331. Distinguishing *North Carolina Comm'n* v.

Southern R. Co., 185 N. C. 435. See *Pittsburgh & W. Va. R. Co.* v. *Lake Erie, A. & W. R. Co.*, 81 I. C. C. 333; *Chamber of Commerce* v. *Wichita Falls, R. & Ft. W. R. Co.*, 109 I. C. C. 81; *Alabama & V. R. Co.* v. *Jackson & E. R. Co.*, 271 U. S. 244.

The Commission has jurisdiction to require construction of the station under paragraph 4 of § 3, which confers upon it the power, under the circumstances therein specified, to require the use of terminal facilities of one carrier by another carrier or carriers. See Los Angeles Station Case, 264 U. S. 331, at pp. 343, 344. The carriers now already own most of the lands and tracks needed for the station. Hence, under the decision of this Court in that case, the Commission has authority under paragraph 4 to require the construction and operation of the station.

The following decisions hold that the fact that compliance with an order for the construction of a union passenger depot will require a railroad to acquire additional property by the exercise of the power of eminent domain, does not militate against the validity of the order. *Railroad Comm'n* v. *Northern Alabama R. Co.*, 182 Ala. 357; *Railroad Comm'n* v. *Alabama G. S. R. Co.*, 185 Ala. 354; *Mayor* v. *Norwich & W. R. Co.*, 109 Mass. 103; *Dewey* v. *Atlantic C. L. R. Co.*, 142 N. C. 392; *State* v. *St. Louis S. W. R. Co.*, 165 S. W. 491. See also *Wisconsin, M. & P. R. Co.* v. *Jacobson*, 179 U. S. 287.

The argument of the Commission that the States may have been divested of authority to order construction of union passenger stations, but that such authority has not been conferred on it, would result in the inability of any public authority, state or federal, to make the order prayed for by the City of Los Angeles. Such a conclusion should not be reached unless there is no escape from it. *Cleveland, C. C. & St. L. R. Co.* v. *United States*, 275 U. S. 404.

As has already been noted, the judgment of the Supreme Court of California annulling the order of the Railroad Commission was thereafter affirmed by this Court. 264 U. S. 331. These decisions are in harmony with the well-established rule that, when Congress acts in such a way as to manifest its purpose to exercise its constitutional authority, the regulating power of the State ceases to exist.

Messrs. Frank Karr, A. S. Halsted, C. W. Durbrow, Robert Brennan, and *E. W. Camp* filed a brief on behalf of the Southern Pacific Company, Southern Pacific Railroad Company, Los Angeles & Salt Lake Railroad Company, and The Atchison, Topeka & Sante Fe Railway Company, as *amici curiae,* by special leave of Court.

A public utility which has undertaken to render a public service can be required by the Government, in the exercise of its police power, to expend money when necessary to render that service adequate, safe and convenient (subject, of course, to limitations not necessary to particularize here). The Government may not require such a public utility to expend money in the rendition of a service other than, or different from, or in addition to, that which it has undertaken to render. A steam railroad does not undertake to go to its patrons. It undertakes to serve those who come to it. The undertaking of a railroad in this behalf is defined by the location of its tracks and is limited by its franchise. To require a railroad, for the purpose of joining in a union station or for any other purpose, to extend its tracks to a point apart from its line, necessitating the acquisition of additional property and franchises, would amount to a taking of private property for the public use without compensation, a deprivation of property without due process of law, and a denial of the equal protection of the laws.

Congress has not attempted to delegate to the Commission the power to do what the city asked the Commission to do.

To hold that the Transportation Act of 1920 has deprived States of any power that they may have had to do what is here sought, is not tantamount to holding that the power has been given to the Interstate Commerce Commission.

The ruling made against its own jurisdiction by the Interstate Commerce Commission is entitled to great weight.

MR. CHIEF JUSTICE TAFT delivered the opinion of the Court.

By petition filed July 12, 1928, respondent sought from the Supreme Court of the District of Columbia a writ of mandamus compelling petitioner, the Interstate Commerce Commission, to consider the evidence introduced in the proceeding before it known as *Los Angeles Passenger Terminal Cases*, 100 I. C. C. 421; 142 I. C. C. 489, for the purpose of determining whether the Commission shall order the Atchison, Topeka & Santa Fe Railway Company, the Southern Pacific Company, and the Los Angeles & Salt Lake Railroad Company to build and use an interstate union passenger station in the City of Los Angeles, California; and after consideration of the evidence, to make such order therein as the facts may require. The Supreme Court of the District dismissed the petition. The Court of Appeals reversed its judgment and remanded the cause for further proceedings. 34 F. (2d) 228. This Court granted a writ of certiorari.

The Railroad Commission of that State had in 1921 (19 Ops., R. R. Com. of Cal., pp. 740, 937) ordered the carriers to file plans, etc., and to acquire sufficient land within what is known as the Plaza area in that city for a union

passenger station and terminal, to submit plans therefor, and, upon their approval by that Commission, to proceed with the construction of the station. The carriers carried these orders by writs of certiorari to the Supreme Court of the State, and that court, in *Atchison, Topeka & Santa Fe R. Co.* v. *Railroad Commission,* 190 Cal. 214, held that by the Transportation Act of 1920 Congress had taken exclusive authority over the matter of a union interstate terminal depot, and the court therefore denied the State Railroad Commission the jurisdiction which it had sought to exercise. The State Railroad Commission petitioned this Court for writs of certiorari and at the same time instituted proceedings before the Interstate Commerce Commission which resulted in the orders above referred to.

This Court granted a writ of certiorari and on April 7, 1924, rendered its decision in *Railroad Commission of California* v. *Southern Pacific Co.,* 264 U. S. 331, wherein, in affirming the judgment of the state court, we held that the relocation of tracks, which was incidental to the proposed union passenger station, required a certificate of approval by the Interstate Commerce Commission under paragraphs 18 to 21 of § 1, Interstate Commerce Act, as amended by § 402, Transportation Act of 1920 (41 Stat. 476, 478,) as a condition precedent to the validity of any action by the carriers or of any order by the State Railroad Commission, and that until the Interstate Commerce Commission had acted under those paragraphs, the carriers could not be required to provide a new union station or to extend their main tracks thereto as ordered by the State Railroad Commission.

Pending the hearing of the causes in 264 U. S. 331, the direct proceeding, referred to above, was instituted before the Interstate Commerce Commission by the City of Los Angeles, asking for an order by the Commission requiring the three railroads to build a new union station at the

Plaza site. With it were consolidated an application by the Southern Pacific Company for authority to abandon certain main line tracks and the operation of passenger and freight train service on Alameda Street, and an application by the Southern Pacific and the Salt Lake for authority to construct new, and to extend existing lines.

The Commission held, 100 I. C. C. 421, that it was without authority to require the construction of the new union station. It said in the report, at page 430:

"We conclude that we are not empowered to require the construction of a union passenger station as sought in No. 14778. To make the record clear, we repeat that no question of discrimination or preference is presented here and that under the issues framed in the complaint in No. 14778 we will give no consideration to matters shown of record for the purpose of determining whether we should issue an order *requiring* the construction and use of a union station by any of the defendants."

The Commission, in order to facilitate dispatch in the disposition of the case, although it held that it had no power to require the building of an interstate commerce passenger station, made hypothetical certificates, which could be summarized as follows:

(1) That the public convenience and necessity require the extensions of lines that may be necessary to reach and serve any union passenger station within the plaza which may be constructed in accordance with a lawful order of the State Commission and that may be necessary to provide for the incidental rearrangement of passenger and freight routes, and that the expense involved will not impair the carriers' ability to perform their duties to the public. (2) That public convenience and necessity permit the abandonment of train service on Alameda Street and such other abandonments of lines as would be necessary in connection with the establishment of any such station, so lawfully ordered by the State Commission.

The report further found that such joint use of track or other terminal facilities as may be incidental and necessary to the proper operation of any such union station is in the public interest and is practicable, without substantially impairing the owning carriers' ability to handle their own business. As to the application by the Southern Pacific and Salt Lake to extend their lines to permit the joint use of the Southern Pacific's existing station, the Commission's findings were unfavorable and its order denied the application. The Commission's then report was not accompanied by certificates carrying out its findings, and it reserved jurisdiction to alter its findings in the event that the plan of the State Commission, as finally evolved, should be materially different from that 'as here considered to be in the public interest.'

After a further hearing in the direct proceeding instituted by Los Angeles for an order directing the erection of a union station, the prayer of Los Angeles was denied. 142 I. C. C. 489. Thereafter the City filed the petition above referred to, in the Supreme Court of the District of Columbia, for a writ of mandamus. This was in the present proceeding.

Attached to the petition as exhibits were the pertinent parts of the record in the previous cases. There were filed an answer of the Commission, and a demurrer to the answer. The Commission still adhered to its original report. The Supreme Court of the District entered a judgment overruling the demurrer and, the City electing to stand upon the petition, dismissed the petition. On an appeal, the judgment was reversed by the Court of Appeals of the District, which held, in substance, that the Commission was vested with supervisory control over the three carriers and that they were subject to an order requiring the construction of the union station and the necessary connecting tracks prayed for.

The sole question for decision is whether the Interstate Commerce Commission has jurisdiction to order the construction of the union station. This issue arises on provisions of the Interstate Commerce Act, 24 Stat. 379, as amended by the Transportation Act of 1920, 41 Stat. 456, 476–479. These are paragraphs 18 to 22 added to § 1 of the original Act, and paragraphs 3 and 4 of § 3.

These paragraphs and sections of the Transportation Act of 1920 may be shortly stated as follows:

Paragraph 18 forbids the construction of a new line of railroad, or the acquisition or operation of any line of railroad or extension thereof in interstate commerce, unless there shall have been obtained from the Commission a certificate that the present and future convenience and necessity require, or will require, the construction or operation of such additional or extended line of railroad, and forbids any interstate carrier to abandon all or any portion of its line, unless there shall have been obtained from the Interstate Commerce Commission a certificate of public convenience and necessity.

Paragraph 19 requires notice and hearings in any proceeding to secure such certificate.

Section 20 gives the Commission discretionary power to issue such certificates and provides for an injunction at the suit of the United States for any construction, operation or abandonment of such line of railroad or extension thereof without a certificate, and punishes a violation.

Section 21 provides that after a hearing in such proceeding upon complaint, or upon its own initiative without complaint, the Commission may authorize or require by order any carrier by railroad subject to the act to provide itself with safe and adequate facilities for performing as a common carrier its car service, as that term is used in the Act, and to extend its line or lines if the Commission finds that it is reasonably required in the interest of pub-

lic convenience and necessity, and will not impair the ability of the carrier to perform its duty to the public.

Section 3, embracing paragraphs 3 and 4, provides, in paragraph 3, that carriers shall afford all reasonable, proper and equal facilities for the interchange of traffic between their respective lines and for the receiving, forwarding and delivering of passengers or property to and from their several lines and those connecting therewith, and forbids discrimination.

Paragraph 4 provides that if the Commission finds that to do so will not substantially impair the ability of a carrier owning and entitled to the enjoyment of terminal facilities to handle its own business, it may require the use of any such terminal facilities of any carrier, including main-line track or tracks for a reasonable distance outside of such terminal, by another carrier or other carriers, on such terms and for such compensation as the carriers affected may agree upon, or, in the event of a failure to agree, as the Commission may deem just and reasonable for the use so required, as if in condemnation proceedings.

In its final report the Interstate Commerce Commission held that it had no power to require the construction and operation of a union station upon the site specified. The Commission's report was in part as follows:

" Complainants have again raised the question whether we have power to require the defendants to construct and operate a union passenger station upon the site heretofore specified in our findings. Their contention that we have such power was pressed with vigor upon the original submission before us. The complainants point to section 3, paragraphs (3) and (4) of the interstate commerce act as furnishing the necessary statutory authority. As stated in the original report, at page 430, we concluded that we are not empowered to *require* the construction

of a union passenger station as sought in No. 14778, under the issues framed in the complaint therein. . . . In *Alabama & Vicksburg Ry. Co.* v. *Jackson & Eastern Ry. Co.*, 271 U. S. 244, 250, the Supreme Court said:

"'In matters relating to the construction, equipment, adaptation and use of interstate railroad lines, with the exceptions specifically set forth in paragraph (22), Congress has vested in the Commission the authority to find the facts and thereon to exercise the necessary judgment. The Commission's power under paragraph (3) of Sec. 3 to require the establishment of connections between the main lines of carriers was asserted by it in *Pittsburgh & W. V. R. Co.* v. *Lake Erie, A. & W. R. Co.*, 81 I. C. C. 333, a case decided after the withdrawal by the Jackson & Eastern of its application to the Commission for leave to make the junction at Curran's Crossing, and in *Chamber of Commerce* v. *Wichita Falls, R. & Ft. W. R. Co.*, 109 I. C. C. 81. That its jurisdiction is exclusive was held in *People ex rel. New York C. R. Co.* v. *Public Service Commission*, 233 N. Y. 113, 119-121. Compare *Lake Erie, A. & W. R. Co.* v. *Public Utilities Commission*, 109 Ohio St. 103.'"

The Commission proceeded:

"The distinction between a simple switch connection such as was contemplated by the cases previously referred to, and the elaborate facilities sought to be required by us in the present case, is obvious. Re-examination of the whole subject again leads us to the conclusion that under existing law we are not empowered to require the construction of a union passenger station of the character sought by the complaint. . . .

"All issues of fact having been considered and concluded by our original report and this report on further hearing, nothing remains for us but to deny the application of the city of Los Angeles and the intervener, the

Railroad Commission of the State of California, for a final order herein requiring the construction of a station as found in the public interest. . . ."

In weighing the effect of the Transportation Act, it should be noted that in this important measure affecting associations between interstate carriers of a compulsory character, there is nowhere express authority for the establishment of union passenger stations, compulsory or otherwise. Emphasis is put on physical connection between the tracks of one carrier and others if permitted by the Interstate Commerce Commission and if properly paid for, either by agreement or condemnation, by the carrier enjoying the use of the track of the other companies. But it is limited in extent to connections with the terminals of other companies within a reasonable length. This Court said that the possible peril to interstate commerce in a physical connection between two main tracks " shows that the jurisdiction of the Commission over such connections must be exclusive, if the duty imposed upon it to develop and control an adequate system of interstate rail transportation is to be effectively performed. Moreover, the establishment of junctions between the main lines of independent carriers is commonly connected with the establishment of through routes and the interchange of car services, and is often but a step toward the joint use of tracks." *Alabama & V. R. Co.* v. *Jackson & E. R. Co.*, 271 U. S. 244, 250.

The description in the *Alabama Railway* case, 271 U. S. 244, is that of a physical connection between railroads engaged in interstate commerce, but it contains no suggestion that the junction is to include union passenger stations.

There are cases in the state courts in which by virtue of statutory provision railroads are required expressly to unite in a passenger station, if determined by Commis-

sioners appointed by the Court or by a Railroad Commission. *Mayor and Aldermen of Worcester* v. *Norwich & Worcester R. Co.*, 109 Mass. 103, 113; *Railroad Commission* v. *Alabama Northern R. Co.*, 182 Ala. 357; *Railroad Commission* v. *Alabama Great Southern R. Co.*, 185 Ala. 354, 362; *Missouri, O. & G. R. Co.* v. *State*, 29 Okla. 640; *Chicago, R. I. & P. R. Co.* v. *State*, 90 Okla. 173; *State* v. *St. Louis Southwestern R. Co.* (Tex. Civ. App.), 165 S. W. 491, 199 S. W. 829, 930; but there is no Federal case in which is built up out of such words as those which we find in the Transportation Act of 1920 authority for requiring such a station.

Without more specific and express legislative direction than is found in the Act, we can not reasonably ascribe to Congress a purpose to compel the interstate carriers here to build a union passenger station in a city of the size and extent and the great business requirements of Los Angeles. The Commission was created by Congress. If it was to be clothed with the power to require railroads to abandon their existing stations and terminal tracks in a city and to combine for the purpose of establishing in lieu thereof a new union station, at a new site, that power we should expect to find in congressional legislation. Such authority, if conferred in Los Angeles, would have application to all interstate railroad junctions, including the numerous large cities of the country, with their residential, commercial, shopping, and municipal centers now fixed and established with relation to existing terminals. It would become a statute of the widest effect and would enter into the welfare of every part of the country. Various interests would be vitally affected by the substitution of a union station for the present terminals. A selection of its site from the standpoint of a city might greatly affect property values and likewise local transportation systems. The exercise of such power would compel the

carriers to abandon existing terminals, to acquire new land and rights of way and enter upon new construction, to abandon large tracts and to sell territory of the same extent as no longer necessary for the use of the carriers.

There would have to be tribunals to apportion the expenditures and cost as between the carriers. A proper statute would seem to require detailed directions, and we should expect the intention to be manifested in plain terms and not to have been left to be implied from varied regulatory provisions of uncertain scope. It would be a monumental work and one requiring the most extensive exercise of expert engineering and railroad construction. It would make possible great changes of much importance in the plans of every city and in the rearrangement and mutations of railroad property and public and private business structures everywhere. We find no statutory preparation for the organization of such machinery.

We can not agree with the Court of Appeals of the District in its disposition to view § 3, paragraph 3, as vesting the Interstate Commerce Commission "with almost unlimited power in the matter of establishing terminals and union stations for the proper interchange of traffic between the converging interstate railroad lines." The words "reasonable, proper and equal facilities" are of course comprehensive enough to include not only trackage but terminal facilities described as extending a reasonable distance outside of the terminal, but hardly to give the Commission "unlimited power" in the building of union stations.

To attribute to Congress an intention to authorize the compulsory establishment of union passenger stations the country over, without special mention of them as such, would be most extraordinary. The general ousting from their usual terminal facilities of the great interstate car-

riers would work a change of title and of ownership in property of a kind that would be most disturbing to the business interests of every state in the country.

To recognize what is here sought as within the power of the Commission to order to be done in each of all the great cities throughout the United States, and to sustain it as legal, without provision for effective restraint by the carriers, or other interests, would expose the community to possible abuse, with nothing but self-imposed restraint on bureaucratic extravagance.

When the interest of a great city in its improvements is to be promoted entirely at the expense of railroads that enter it, Congress would be expected to hesitate before it would change discretionary leave for the erection of such stations into positive command. In such a case the expenditure of a large amount of capital will not bring with it corresponding increase in the railroad revenues. If Congress had intended to give an executive tribunal unfettered capacity for requisitioning investment of capital of the carriers and the purchase of large quantities of land and material in an adverse proceeding, we may well be confident that Congress would have made its meaning far clearer and more direct than in the present meager provisions of the Transportation Act. The suggestion of complainants is that out of provisions for local union of main tracks and switching tracks we should use our imaginations and develop them into provisions for giant union passenger stations. It is true that the railway systems may be united through switches and connecting tracks in physical connection, but this has not been held to justify great monumental structures, extended in their complicated machinery and superficial extent and expense. There is a difference of real substance between such connecting tracks and switches and junctions, and a metropolitan union passenger station. The latter calls into being a new

entity naturally requiring new legislative authority. This Court, referring to a kindred matter, said of this case:

"But there is a great difference between such relocation of tracks or local union stations and what is proposed here. The differences are more than that of mere degree; they and their consequences are so marked as to constitute a change in kind." 264 U. S. 331, 346.

But it is said that we have already foreclosed the conclusion in this case by our opinion in 264 U. S. 331. The only issue there presented to this Court, was whether it was necessary to secure from the Interstate Commerce Commission its approval of the construction of a union station and the relocation of the connecting tracks proposed. The point in that case was the necessity for the acquiescence by the Interstate Commerce Commission in respect to a union passenger station. We held such a certificate to be necessary before a union station or connecting lines of interstate carriers could be lawful. That is all we held.

It is quite true that we made references in the opinion to a case foreshadowed in the hypothetical certificates of the Commission in the building of a union station. Such references, had, however, not the slightest significance in respect to who could or should build the station, or whence its cost should be defrayed. It was as far as possible from the purpose of the Court in its opinion to indicate its views of the powers which the Commission could exercise adversely to the carriers in compulsory proceedings. They were not before the Court for adjudication.

In what situations, if any, action of the Interstate Commerce Commission may be controlled or corrected by mandamus need not now be considered, because it is apparent that there is here no meritorious basis for exerting such power, even if found to exist.

The judgment of the Court of Appeals of the District of Columbia is *Reversed.*

GENERAL INSURANCE COMPANY OF AMERICA *v.* NORTHERN PACIFIC RAILWAY COMPANY.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 23. Argued October 25, 1929.—Decided November 25, 1929.

Proof that a building close to a railway track took fire soon after the passing of a train does not suffice to show that the fire was caused by sparks from the engine and to raise a presumption of negligence against the railway company in an action for damages caused by the fire. So *held* in accordance both with rulings of the Supreme Court of the State of Washington where the fire occurred and the action was brought, and with rulings of the federal courts. P. 76.

28 F. (2d) 574, affirmed.

CERTIORARI, 279 U. S. 827, to review a judgment of the Circuit Court of Appeals, which affirmed a judgment of the District Court granting a non-suit against the plaintiff, the present petitioner, in an action for damages caused by fire alleged to have resulted from negligence of the defendant Railway Company.

Mr. Ralph S. Pierce presented the oral argument, and *Messrs. James B. Howe, Donald G. Graham,* and *James B. Howe, Jr.,* filed a brief, for petitioner.

Mr. Dennis F. Lyons, with whom *Mr. L. B. daPonte* was on the brief, for respondent.

MR. CHIEF JUSTICE TAFT delivered the opinion of the Court.

The General Insurance Company of America, a Washington corporation, issued to Peter Agor, a citizen and resident of the State of Washington, two policies for $12,000 each, insuring him against loss or damage by fire

to wool and sacks contained in a warehouse situated in Benton County, Washington. While the policies were in full force, the warehouse and the wool and sacks contained therein were destroyed by a fire, which started on the 2nd of May, 1926, sometime between 7 and 10 o'clock in the evening.

Thereafter the Insurance Company made two payments to Agor, totalling $20,481.90, in discharge of its liability to him under the policies. May 14, 1926, Agor executed "subrogation receipts" to the Insurance Company, in which he acknowledged receipt of the sum above mentioned in full settlement of his claims against the Company for loss and damage caused by the fire, and by which he assigned and transferred to the Insurance Company his claims against any person or corporation which might arise due to the loss and damage sustained by him, and by which the Company was subrogated to the extent of the amount paid to him.

Then the Insurance Company brought this action in the United States District Court for the Western District of Washington, alleging, in its amended complaint, a cause of action against the Railway Company under each policy and subrogation receipt, for the amount paid to Agor, with interest, on the ground that the loss was due to the negligence of the Railway Company in operating its railroad.

The Railway Company denied that it was responsible for the fire or was guilty of negligence in respect to it.

Trial was had; four witnesses were sworn and examined for the plaintiff, and the plaintiff rested. The counsel for the defendant moved for a non-suit. The motion was granted and a judgment of dismissal entered. This was on the ground that the plaintiff had failed to indicate any facts sufficient to show negligence on the part of the defendant as alleged, or at all. The Circuit Court of Appeals affirmed the judgment.

The facts were that the fire occurred at Badger in the State of Washington. Badger was a small station on the Northern Pacific Railway southeast of Seattle, on the main line of the Company. The warehouse which burned was 40 or 50 feet from the main tracks. The warehouse was possibly 50 feet wide and 200 feet long. The country about was sand and sagebrush. There was no blowing of the wind testified to, except at noon of the day of the fire. The fire was between half-past seven and ten in the evening. There was no wind in the evening. A freight train of 70 cars passed going south between those hours. It was a double-header. Between Badger and the previous station, 7 miles away, there was a stiff upgrade from north to south, and there was a good deal of puffing and smoke between the two stations. The evidence is quite clear, however, that for a measurable distance before the train reached Badger the grade was either on the level or down hill. There was no evidence of the presence of sparks from the engine at the time of the fire or during the evening. About twenty minutes after the train had passed Badger the fireman looked back and remarked to the engineer that there seemed to be a fire burning up all Badger. Badger was a lonely station. There was no station house there. There were only three employees of the Railway Company there and only three or four shacks beside the warehouse. The fire occurred Sunday evening.

The chief witness called by the Insurance Company testified he went to bed about eight o'clock, that he was waked by the section foreman about ten o'clock. The fire had begun at the southwest corner of the warehouse some 50 feet away from the track, and when he saw it it was climbing from the ground up. The two or three men who were present were not able to do anything to put the fire out, and the building continued to burn until the next day. There is no other evidence of the circumstances

under which the fire took place. The warehouse was one which could be opened by a key that was usually left in the lock or in a hole near the door. There was evidence that there were people who resorted to the warehouse and slept there at times—sheep-shearers and others; but no testimony shows that at the time of the fire there was any blowing of tumble-weeds or other things which would convey fire. This is a case in which if negligence is to be presumed, it must arise from the mere passing of the train followed by a fire. Nothing shows negligence by the engineer, the fireman or the employees of the Railway Company. No one is able to suggest what it was that started the fire. There were many rats in the warehouse. There had been vagrants around it. At times people had seen tumble-weeds blown about in a wind, but nothing of this kind indicates an occasion for a fire at the time when it took place.

Counsel differ as to the law which should govern the decision in this case, whether Washington or Federal (so-called). In our judgment, it makes no difference.

A leading case in Washington is that of *Thorgrimson* v. *Northern Pacific R. Co.*, 64 Wash. 500. That was an action for damages by the owner of a roofing plant situated about 80 feet south of the main line of the railway company, and the theory of the suit was that the railway company had negligently operated its train past the plant and caused the fire which destroyed the property of the plaintiff.

The Supreme Court of the State said [p. 502]:

"The rule putting the burden on the railway company to explain the cause of a fire following a passing engine, to which this court is probably committed (*Overacker* v. *Northern Pac. R. Co., ante,* [64 Wash.] p. 491, 117 Pac. 403), and which counsel relied on to carry the case to the jury on questions of equipment and operation, is one of

necessity, and is applied so that justice may not be defeated. But we know of no cases going to the extent to which counsel would have us go to sustain their contention; that is, to presume negligence from the mere passing of the train followed by a fire. It is the proof of setting the fire, and not the fact that a building adjacent to a railroad right of way was burned, that raises the inference of negligence and shifts the burden of proof. In all the cases we have examined, including those from our own court, where the burden has been shifted from plaintiff to defendant, there has been some evidence from which the jury might infer with reasonable certainty that the fire would not have occurred unless set by the passing train. Counsel admitted on the trial and appellants now admit that they have no evidence other than circumstantial evidence."

The facts of the case before us do not show anything more than the passing of the train and the existence of fire fifteen or twenty minutes afterwards. No connection is shown between the fire and the passing of the train except that of sequence. The principles of the Washington case cited would require a non-suit in this case.

Nor are the Federal cases any more favorable to the petitioner. In *McCullen* v. *Chicago & Northwestern R. Co.*, 101 Fed. 66, the action was to recover the value of property said to have been set on fire by sparks from the passing train on the defendant's road. The evidence was conflicting and the effect of the decision was that where there was conflicting evidence as to whether the fire was set by sparks from a passing train, the case should be held to be one for a jury, and one in which a presumption would arise from the fact of causing the fire that there was negligence to be charged to the company. But that case differs from the one at bar, for the reason that there

was evidence there that the fire was occasioned by sparks from the engine. No such evidence appears here. There is entire absence of evidence here that the fire was created by the presence of any sparks.

Another Federal case is that of *Garrett* v. *Southern R. Co.*, 101 Fed. 102. It was there held by the Circuit Court of Appeals of the Sixth Circuit that in an action against a railroad company for damages from fire alleged to have been set by sparks from the defendant's locomotive, the burden was on the plaintiff to prove not only that the fire was caused by sparks from the defendant's engine but that the emission of such sparks was due to defendant's negligence.

In the present case we need not go so far. Both the circumstances that sparks caused the fire and that their presence was due to the negligence of the railroad company are absent. The case comes exactly within the rule laid down by this Court in the *Nitro-Glycerine* case, 15 Wall. 524, 538, where Mr. Justice Field said:

"Outside of these cases in which a positive obligation is cast upon the carrier to perform safely a special service, the presumption is that the party has exercised such care as men of ordinary prudence and caution would exercise under similar circumstances, and if he has not, the plaintiff must prove it. Here no such proof was made and the case stands as one of unavoidable accident, for the consequences of which the defendants are not responsible. The consequences of all such accidents must be borne by the sufferer as his misfortune."

We think the trial judge was right in granting a nonsuit and the Circuit Court of Appeals in affirming it.

Judgment affirmed.

WILLIAMS ET AL. *v.* RILEY, STATE CONTROLLER OF CALIFORNIA.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

No. 12. Argued April 18, 1929.—Decided November 25, 1929.

Statutes of California directed that all distributors of motor vehicle fuel should be licensed and pay taxes amounting to three cents per gallon sold, less an allowance of 1%, and provided for reimbursing purchasers of fuel not used for operating vehicles upon public highways. Plaintiffs, who, like thousands of other citizens and taxpayers of the State, must obtain fuel for operating their motor vehicles along the highways from the licensed distributors at prices enhanced by the 3-cent tax, sued the state officer charged with the duty of collecting the tax to enjoin him from so doing, alleging that the tax was in conflict with the Fourteenth Amendment, the Federal Highway Acts, and the constitution of the State. *Held* that the plaintiffs had no status to maintain such a suit. *Frothingham* v. *Mellon,* 262 U. S. 447. P. 79.

Affirmed.

APPEAL from a decree of the District Court (three judges) dismissing the bill in a suit to enjoin the State Controller of California from enforcing statutes imposing a gasoline tax.

Messrs. Edwin C. Ewing and *W. R. Crawford* submitted for appellants.

Mr. Frank L. Guerena, Deputy Attorney General of California, with whom *Mr. U. S. Webb,* Attorney General, was on the brief, for appellee.

Opinion of the Court by MR. JUSTICE MCREYNOLDS, announced by the CHIEF JUSTICE.

By Acts approved July 11, 1916, Chap. 241, 39 Stat. 355, and Nov. 9, 1921, Chap. 119, 42 Stat. 212, Congress provided for aid to the states in road-making and directed "that all highways constructed or reconstructed

under the provisions of this Act shall be free from tolls of all kinds." California assented to the provisions of these acts and under them received large sums of money from the United States.

By the Motor Vehicle Fuel Tax Statutes, Chap. 267, Act 1923, Chap. 359, Act 1925, and Chaps. 716, 795, Act 1927, the California Legislature defined motor vehicle fuel and directed that all distributors of it should be licensed and pay taxes to the Controller of the State, amounting to three cents per gallon sold, less an allowance of one per centum. These statutes further provide for reimbursing purchasers of fuel not used for operating vehicles upon public highways.

Appellants, along with thousands of other citizens and taxpayers of California, operate motor vehicles along the highways. They have procured, and must hereafter procure, the necessary fuel from licensed distributors at prices enhanced by the amount of the three cent tax.

The original bill, filed in the District Court of the United States August 4, 1928, names as the only defendant the State Controller—the officer charged with the duty of enforcing the Motor Vehicle Fuel Tax Statutes. It proceeds upon the theory that those statutes, under the form of taxing dealers from whom appellants and all other operators of motor vehicles must buy, in effect exact tolls for the use of the highways, also grant certain favors to the distributors, and deprive all such purchasers of their property without due process of law. Therefore, it is said, they conflict with the Fourteenth Amendment, the Federal Highway Acts, and the Constitution of California. The prayer is for a decree declaring their invalidity and for an injunction restraining defendant from attempting to enforce them, etc.

In the court below—three judges sitting—the bill was dismissed, without written opinion.

Appellants may not undertake to test the validity of the questioned acts by a proceeding of this character.

Frothingham v. *Mellon, Sec'y of the Treasury,* 262 U. S. 447, 487, 488, announces the applicable doctrine.

"The administration of any statute, likely to produce additional taxation to be imposed upon a vast number of taxpayers, the extent of whose several liability is indefinite and constantly changing, is essentially a matter of public and not of individual concern."

The federal courts have no power *per se* to review and annul acts of state legislatures upon the ground that they conflict with the federal or state constitutions. "That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act."

The decree below is

Affirmed.

The CHIEF JUSTICE, MR. JUSTICE VAN DEVANTER and MR. JUSTICE BUTLER are of opinion that the appellants' status is such as entitles them to test the validity of the California statutes in question; that these statutes do not exact tolls for the use of highways within the meaning of the limitation contained in the Federal Highway acts, and are not subject to the other objections urged against them; and that for these reasons the decree below should be affirmed.

BEKINS VAN LINES, INCORPORATED, ET AL. *v.* RILEY, STATE CONTROLLER OF CALIFORNIA.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

No. 13. Argued April 18, 1929.—Decided November 25, 1929.

A state law which, in the taxation of carriers of freight by motor vehicle using the public highways, distinguishes between those common carriers who operate over regular routes between fixed termini and other carriers, common and private, does not deprive

the first mentioned class of equal protection in violation of the Fourteenth Amendment, even if the tax upon it be more burdensome than that upon the others, since it can not be said that the classification lacks any reasonable basis. So *held* in view (1) of the differences between common and private carriers, and (2) of the probability that common carriers operating regularly between fixed termini cause greater wear to the public highways and greater danger to the public thereon. P. 82.

Affirmed.

APPEAL from a decree of the District Court (three judges) dismissing a bill to enjoin the State Controller from enforcing a tax on the appellants' gross receipts from transportation of freight on public highways in motor vehicles.

Mr. Samuel T. Bush, with whom *Mr. William Sea, Jr.,* was on the brief, for appellants.

Mr. Frank L. Guerena, Deputy Attorney General of California, with whom *Mr. U. S. Webb,* Attorney General, was on the brief, for appellee.

Opinion of the Court by MR. JUSTICE MCREYNOLDS, announced by the CHIEF JUSTICE.

Appellants, as common carriers, are engaged in transporting freight by motor vehicles for hire along public highways between fixed termini and over regular routes within California. The 1926 Amendment to the Constitution and the statutes of that State lay upon such carriers a tax of 5% of their gross receipts in lieu of all other taxes, while other freight carriers, common and private, by motor vehicles, are subjected to different and, it is alleged, less burdensome taxation. Cal. Const., Art. 13, § 15; March 5, 1927, Chap. 19, 1927 Cal. Stats.

By this proceeding, instituted July 21, 1928, appellants ask that the constitutional amendment and the statute

which undertake to lay such tax upon them be declared discriminatory and in conflict with § 1, of the Fourteenth Amendment; also that an injunction issue against the State Controller forbidding him from attempting to enforce payment.

Upon motion, without written opinion, the District Court—three judges sitting—dismissed the bill. The cause is here by direct appeal; and the only matter for our determination is the validity of the challenged classification.

The power of a State in respect of classification has often been declared by opinions here. We are unable to say that there was no reasonable basis for the one under consideration; the court below reached the proper result; and its decree must be affirmed.

Appellants voluntarily assumed the position of common carriers operating between fixed termini and enjoy all consequent benefits. That a marked distinction exists between common and private carriers by auto vehicles appears from *Frost* v. *Railroad Commission,* 271 U. S. 583 and *Michigan Public Utilities Commission* v. *Duke,* 266 U. S. 570. Sufficient reasons for placing common carriers, operating as appellants do, in a special class are pointed out by *Raymond* v. *Holm,* 165 Minn. 215; *State* v. *Le Febvre,* 174 Minn. 248; *Iowa Motor Vehicle Assn.* v. *Board of Railroad Commissioners,* 207 Iowa 461; *Liberty Highway Co.* v. *Michigan Public Utilities Commission,* 294 Fed. 703. Their use of the highways probably will be regular and frequent and, therefore, unusually destructive thereto. Also it will expose the public to dangers exceeding those consequent upon the occasional movements of other carriers.

Although relied upon by counsel and said to be almost identical with the case at bar, *Quaker City Cab Co.* v. *Pennsylvania,* 277 U. S. 389, gives no support to claim of

undue discrimination. We regard the controversy as not open to serious doubt and further discussion of it seems unnecessary.

Affirmed.

SAFE DEPOSIT AND TRUST COMPANY OF BALTIMORE *v.* COMMONWEALTH OF VIRGINIA.

APPEAL FROM THE SPECIAL COURT OF APPEALS OF VIRGINIA.

No. 20. Argued October 24, 1929.—Decided November 25, 1929.

1. Cause held properly here on appeal; certiorari denied. P. 89.
2. A statute of a State which undertakes to tax things wholly beyond her jurisdiction or control conflicts with the Fourteenth Amendment. P. 92.
3. *Mobilia sequuntur personam* is a fiction intended for convenience, not controlling where justice does not demand it, and not to be applied if the result would be a patent and inescapable injustice through double taxation, or otherwise. Pp. 92, 93.
4. Intangibles, such as stocks and bonds, in the hands of the holder of the legal title, with definite taxable situs at that owner's residence not subject to be changed by the equitable owner, may not be taxed at the latter's domicile in another State. P. 93.
5. A citizen of Virginia transferred a fund of stocks and bonds to a Maryland Trust Company in trust for his two minor sons. The trustee was empowered to change the investments and was to accumulate the income, first paying taxes and its own commissions, and, as each son attained the age of twenty-five years, was to pay him one-half of the principal with the income accumulated thereon. If either son died before receiving his share, his share was to be paid over to his children, if he left any; otherwise it was to be added to that of the surviving son and held for his use and benefit in the same manner as the original share of that son was held. The deed made no provision for the event of death of both sons under twenty-five without issue. The donor reserved to himself a power of revocation but died in Virginia without exercising it. The Trust Company continued to hold the original securities in Baltimore, Maryland, and paid the taxes regularly demanded by that City and State on account of them. Administration of the

donor's estate was had in Virginia, where the two sons, still in their minority, also were domiciled. The courts of Virginia sustained a Virginia tax upon the whole corpus of the trust estate by regarding the sons, in conjunction with the administrator, as the real owners of it. *Held* that the tax was on property beyond the jurisdiction of the State and invalid under the Fourteenth Amendment.

151 Va. 883, reversed.

APPEAL from a judgment of the Special Court of Appeals of Virginia which affirmed a judgment denying relief to the Trust Company from assessments of taxes.

Mr. Littleton M. Wickham, with whom *Messrs. J. Jordan Leake, A. S. Buford, Jr., Wm. P. Constable,* and *Joseph M. Hurt, Jr.,* were on the brief, for appellant.

The statute is unconstitutional unless the *cestuis* and the estate own the entire *corpus.* We take it to be undisputed by counsel for the Commonwealth that no greater tax would have been imposed had an identical set of securities been held in absolute estate by a resident of Richmond, Virginia, in his safe-deposit box in a Richmond bank.

It surely cannot be contended that the mere accident of appellant's appearance before a Virginia tribunal can justify the taxation of the corpus of a fund held in Maryland, when appellant neither resides in Virginia nor is acting in any fiduciary capacity under the supervision of a Virginia court. *Dewey* v. *Des Moines,* 173 U. S. 193.

A State has power to tax intangibles held without its borders to the extent only of such interest therein as may belong to a resident of the State. *Brooke* v. *Norfolk,* 277 U. S. 27.

The inquiry here, then, is what interest in the fund assessed is owned by residents of Virginia? Obviously, the owners of the largest share are appellant's *cestuis,* but, though their interest may be technically a fee de-

feasible, it is certainly not the entirety. *Saltonstall* v. *Saltonstall,* 276 U. S. 260. Assume the disabilities of nonage removed, so that the *cestuis* could validly bind themselves to part with their interest, could they, or either of them, obtain for it the value actually taxed? Obviously not, because any purchaser would estimate the probability of a defeasance and reduce accordingly the amount he would be willing to pay. In other words, neither *cestui* can sell the remainder, or whatever estate depends upon his death before 25, since such estate is owned by others, amongst whom are his brother and his own issue (now unborn). We do not now contend that the State of Virginia could not constitutionally tax whatever may be the value of the *cestui's* interest. This, however, she has not seen fit to do (as she has not, indeed, provided any machinery for ascertaining such value); but, on the contrary, she has taxed the entirety.

Still another interest is owned by the Kellam estate, as representing such persons as may take in event both *cestuis* die without issue and under twenty-five. The contingency is not provided for in the trust, and the record is, of course, silent as to the place of residence of these persons, if they exist or are identifiable. Whoever they are, or wherever they may be, it is clear that their interest is a mere reversion, if we may speak by analogy with the law of real property, and, as such, is far from entire.

The Kellam estate as standing in the place of the grantor, can claim no ownership. *Bullen* v. *Wisconsin,* 240 U. S. 625. No resident ownership, therefore, can be predicated upon the fact that administration took place in Virginia.

The interests belonging to both *cestuis* when added to those belonging to the estate, fall short of totality by the extent of the interest belonging to the *cestuis'* issue, whom, as already stated, we may with complete confi-

dence assume to have been yet *in futuro* at the time of the institution of these proceedings, as the two boys were then, respectively 14½ and 11 years old.

The contingent interests just discussed would seem to have no *situs* apart from the securities themselves, and the securities are in Maryland, not Virginia. In other words, so far as concerns these contingent interests, there is no "person for the movables to follow."

Any theory that would support a tax in this case on the ground that the property was once in Virginia must, we conceive, be based on a fundamental misconception of state power and jurisdiction. *State Tax on Foreign Held Bonds,* 15 Wall. 300; *Frick* v. *Pennsylvania,* 268 U. S. 473.

Now, "jurisdiction" and "power to impose" a tax are questions, not of motive, but of fact. Their existence does not depend on the intentions of the person whose object it may be to escape them. Either the property is within the jurisdiction or it is not. Can a tax upon it be justified by a retrospective view of why it is where it is? Surely not. If M, a resident of Virginia, believing his taxes too burdensome and desiring to escape them, removes himself and all his property to another State, could this Commonwealth (assuming she in some way obtained a temporary jurisdiction of his person) impose a tax on his property? Surely not. Yet any theory involving origin as a criterion would justify a tax in that case. Cf. *Buck* v. *Beach,* 206 U. S. 392.

Appellant's *cestuis* are not, from the constitutional standpoint, the owners of the fund in any sense of this term. Ownership is not a technical conception but one that should be viewed realistically and as meaning possession or control, or the immediate right to either. *Bullen* v. *Wisconsin,* 240 U. S. 625; *Wachovia* v. *Doughton,* 272 U. S. 567; *Brooke* v. *Norfolk,* 277 U. S. 27; *Attorney General* v. *Power,* [1906] 2 I. R. 272, K. B. D.

The ownership pertaining to appellant's *cestuis* in their own right will not support the constitutionality of the statute.

Mr. Henry R. Miller, Jr., with whom *Mr. W. W. Martin* was on the brief, for appellee.

The proper party appellant is "The Safe Deposit and Trust Company of Baltimore, Maryland, Trustee for L. J. and E. P. Kellam," and not that company in its individual capacity.

Under the doctrine of *mobilia sequuntur personam*, approved in *Blodgett* v. *Silberman*, 277 U. S. 1, Virginia may tax intangible property such as is here involved to its residents, even though the physical evidences thereof be located outside the jurisdiction of Virginia. *Fidelity & Columbia Trust Co.* v. *Louisville*, 245 U. S. 54; and even though the legal title thereto be in a non-resident.

The question at issue here is, did the sons "own" so much of the trust fund as amounted in value to the value of the entire fund? If they did, the assessment is valid.

The two sons took vested absolute estates in the personal property, with their enjoyment thereof postponed, such vested estates being subject to be divested upon the happening of either of the conditions subsequent. *Cropley* v. *Cooper*, 19 Wall. 167; *Carter* v. *Keesling*, 130 Va. 655. There can be no question of the right of Virginia to tax such vested estates, and such other estates as the two sons have in the property.

It is argued, however, that the aggregate value of the sons' interest is less than the value of the fund, the difference being represented by (a) the interests of the unborn issue and (b) the interests of whatever persons take in the event of the death of both sons under twenty-five and without issue.

The interests of the unborn issue of the sons are of no value. *Howbert* v. *Cauthorn*, 100 Va. 649; *Young* v. *Young*, 89 Va. 675.

It is true that by statute in Virginia now, such an interest as was involved in either of those two cases may be disposed of by deed and, even in the absence of statute, a deed of such interest might operate as an estoppel. But the "naked possibility" is not thereby given any value.

In the *Howbert* and *Young* cases some of the remaindermen were *in esse*. Here the remaindermen are yet unborn. The interests of the unborn issue are thus dependent upon a double contingency—birth of issue, death of the issue's father under twenty-five—and are thereby reduced from a "naked possibility" to a "strong improbability."

Then too, the assessment of a property tax is made upon the basis of the value of the property at a definite day in the past, not upon the value of the property in the future. On the dates when these assessments were made, the two sons were the owners of the absolute estate in the personalty. They were both alive without issue and there was, therefore, no derogatory estate in any one else.

The possibility of death of both sons under twenty-five, without issue, does not defeat the assessment. Should such event happen, the property would descend to the heirs of the one dying second, or pass under his will to his legatees. As to this contingency, the deed of trust is silent, and there can be no estate in other persons by way of limitation upon such event, save by implication, and such limitations are not favored and the courts will incline against their creation either by devise or by deed, when the words employed are not clear and definite. *Brewster* v. *McCall*, 15 Conn. 274. In the absence of all reference to such an event, and when it was the intent of the grantor in the deed to give to the beneficiaries an absolute estate, it should be held that the happening of the con-

tingency (death of both sons under twenty-five without issue) does not affect the estate already created by the death of the first son, which estate is (1) an absolute estate in the then surviving son, or (2) a reversion in the grantor in the deed. Both (1) and (2) are represented by residents of Virginia, and Virginia may therefore tax those interests and include such tax in the assessment made against the trustee, who is directed to pay all taxes chargeable. Distinguishing *Brooke* v. *Norfolk*, 277 U. S. 27.

Mr. Russell L. Bradford, as *amicus curiae*, filed a brief on behalf of The City Bank Farmers Trust Company, of New York, as Trustee, by special leave of court.

Opinion of the Court by MR. JUSTICE MCREYNOLDS, announced by the CHIEF JUSTICE.

This cause is properly here upon appeal. The petition for certiorari is therefore denied.

May 4th, 1920, Lucius J. Kellam, then domiciled and residing in Accomac County, Virginia, transferred and delivered to the Safe Deposit and Trust Company of Baltimore, Maryland, stocks and bonds of sundry corporations valued at fifty thousand dollars, with power to change the investments, upon the following terms—

" . . . to collect the income arising therefrom and after paying such taxes as may be chargeable thereon and its 5% commissions on the gross income, to accumulate the net income for the benefit of the two sons of myself, that is to say, Lucius J. Kellam, Jr., who attained the age of eight years on September 25, 1919, and Emerson Polk Kellam, who attained the age of five years on February 5, 1920, and when the said Lucius J. Kellam, Jr., arrives at twenty-five years of age, to deliver to him one-half of the principal of the estate hereby conveyed and one-half of the said accumulations of income—the other half of the

said principal and accumulations of income shall be retained by said Trustee and all income therefrom shall continue to be accumulated until the said Emerson Polk Kellam arrives at twenty-five years of age when he shall become entitled to the said one-half of the principal and accumulations so retained together with all further accumulations thereon. If either of said two sons shall die before receiving his share of said principal and accumulations, then the same shall be paid over and delivered to his children living at his death; and if either shall die before receiving his share without issue, then such share shall be added to the share of the survivor and be held for his use and benefit in the same manner precisely as his original share is held."

The deed made no provision for the event of death of both sons under twenty-five without issue. The donor reserved to himself power of revocation, but without exercising it, died in 1920. Administration on his estate was had in Accomac County, Virginia, and his two sons are domiciled there.

Except as changed by reinvestment, the Trust Company has continued to hold the original securities in Baltimore, Maryland, and has paid the taxes regularly demanded by that City and State on account of them.

An assessment for taxation in Accomac County, Virginia, for the years 1921, 1922, 1923, 1924 and 1925 upon the whole corpus of the trust estate was sustained by the court below—the highest State tribunal to which the matter could be submitted. It declared Sec. 2307, Virginia Code (1919), as amended in 1920, 1922 and 1923*,

* Sec. 2307, Va. Code 1919 (as amended). *By whom property is to be listed; to whom taxed.*—If property be owned by a person sui juris, it shall be listed by and taxed to him. If property be owned by a minor, it shall be listed by and taxed to his guardian or trustee, if any he has; if he has no guardian or trustee it shall be listed by and taxed to his father, if any he has; if he has no father,

applicable, adequate to support the demand and not in conflict with the Fourteenth Amendment.

Appellant maintains that, so interpreted and applied, the statute lays a tax upon property wholly beyond the jurisdiction of the State and consequently offends the Fourteenth Amendment.

Manifestly, the securities are subject to taxation in Maryland where they are in the actual possession of the Trust Company—holder of the legal title. That they are property within Maryland is not questioned. *De Ganay* v. *Lederer,* 250 U. S. 376, 382. Also, nobody within Virginia has present right to their control or possession, or to receive income therefrom, or to cause them to be brought physically within her borders. They have no legal situs for taxation in Virginia unless the legal fiction *mobilia sequuntur personam* is applicable and controlling. The court below, recognizing this, held the two sons, in conjunction with the administrator of the father's estate—all domiciled in Virginia—really owned the fund

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then it shall be listed by and taxed to his mother, if any he has; and if he has no guardian, nor trustee, father nor mother, it shall be listed by and taxed to the person in possession. If the property is the separate property of a person over twenty-one years of age or a married woman, it shall be listed by and taxed to the trustee, if any they have in this State; and if they have no trustee in this State, it shall be listed by and taxed to themselves. In either case, it shall be listed and taxed in the county or city where they reside; but if they be non-residents of Virginia, the property shall be listed and taxed in the county or city wherein such trustee resides. If the property be the estate of a deceased person, it shall be listed by the personal representative or person in possession, and taxed to the estate of such deceased person. If the property be owned by an idiot or lunatic, it shall be listed by and taxed to his committee, if any; if none has been appointed, then such property shall be listed by and taxed to the person in possession. If the property is held in trust for the benefit of another, it shall be listed by and taxed to the trustee in the county or city of his residence (except as hereinbefore provided).

and that by reason of the fiction its taxable situs followed them.

We need not make any nice inquiry concerning the ultimate or equitable ownership of the securities or the exact nature of the interest held by the sons. In the disclosed circumstances, we think that is not a matter of controlling importance.

Ordinarily this Court recognizes that the fiction of *mobilia sequuntur personam* may be applied in order to determine the situs of intangible personal property for taxation. *Blodgett* v. *Silberman,* 277 U. S. 1. But the general rule must yield to established fact of legal ownership, actual presence and control elsewhere, and ought not to be applied if so to do would result in inescapable and patent injustice, whether through double taxation or otherwise. *State Board of Assessors* v. *Comptoir National d'Escompte,* 191 U. S. 388, 404; *Buck* v. *Beach,* 206 U. S. 392, 408. *Liverpool & L. & G. Ins. Co.* v. *Orleans Assessors,* 221 U. S. 346, 354; *Maguire* v. *Trefry,* 253 U. S. 12, 17. Here, where the possessor of the legal title holds the securities in Maryland, thus giving them a permanent situs for lawful taxation there, and no person in Virginia has present right to their enjoyment or power to remove them, the fiction must be disregarded. It plainly conflicts with fact; the securities did not and could not follow any person domiciled in Virginia. Their actual situs is in Maryland and can not be changed by the *cestuis que trustent.*

The power of Virginia to lay a tax upon the fair value of any interest in the securities actually owned by one of her resident citizens is not now presented for consideration. See *Maguire* v. *Trefry, supra.*

A statute of a State which undertakes to tax things wholly beyond her jurisdiction or control conflicts with the Fourteenth Amendment. *Union Refrigerator Transit Co.* v. *Kentucky,* 199 U. S. 194, 204; *Buck* v. *Beach,* 206

U. S. 392, 402, 408, 409; *Frick* v. *Pennsylvania,* 268 U. S. 473; *Wachovia Bank & Trust Co.* v. *Doughton,* 272 U. S. 567, 575.

Tangible personal property permanently located beyond the owner's domicile may not be taxed at the latter place. *Union Refrig. Transit Co.* v. *Kentucky, supra; Frick* v. *Pennsylvania, supra.* Intangible personal property may acquire a taxable situs where permanently located, employed and protected. *New Orleans* v. *Stempel,* 175 U. S. 309; *Bristol* v. *Washington County,* 177 U. S. 133; *State Board of Assessors* v. *Comptoir National d'Escompte,* 191 U. S. 388; *Metropolitan Life Ins. Co.* v. *New Orleans,* 205 U. S. 395; *Liverpool & L. & G. Ins. Co.* v. *Orleans Assessors,* 221 U. S. 346.

Here we must decide whether intangibles—stocks, bonds—in the hands of the holder of the legal title with definite taxable situs at its residence, not subject to change by the equitable owner, may be taxed at the latter's domicile in another State. We think not. The reasons which led this Court in *Union Refrig. Transit Co.* v. *Kentucky,* 199 U. S. 194, and *Frick* v. *Pennsylvania,* 268 U. S. 473, to deny application of the maxim *mobilia sequuntur personam* to tangibles apply to the intangibles in appellant's possession. They have acquired a situs separate from that of the beneficial owners. The adoption of a contrary rule would "involve possibilities of an extremely serious character" by permitting double taxation, both unjust and oppressive. And the fiction of *mobilia sequuntur personam* "was intended for convenience, and not to be controlling where justice does not demand it."

No opinion of this Court seems definitely to rule the exact point now presented. *Blackstone* v. *Miller,* 188 U. S. 189, sustained an assessment of tax by New York upon the transfer of credits, declared to have taxable situs within her borders, under the will of a citizen of Illinois,

In *Wheeler* v. *Sohmer*, 233 U. S. 434, the tax was not laid at the owner's domicile, but by the State wherein the securities were deposited. *Bullen* v. *Wisconsin*, 240 U. S. 625, involved an inheritance tax; the creator of the trust resided in Wisconsin at his death and an Illinois Company with legal title then held possession of the property in Chicago; but the creator had retained full power to revoke the trust and regain control. *Fidelity & Columbia Tr. Co.* v. *Louisville*, 245 U. S. 54, sustained a tax laid at the domicile of the legal owner. He had full power to control the deposits in St. Louis banks and might have brought the entire fund within Kentucky's jurisdiction. In *Blodgett* v. *Silberman*, 277 U. S. 1, the decedent—a resident of Connecticut—had control and present right to all benefits arising from the property. The legal title was not held by another with the duty to retain possession, as in the present cause. Moreover, this Court did not there determine that the property had a taxable situs in New York.

Any general statement in the above opinions which may seem to interfere with the conclusion here announced must be limited and confined to the precise situation then under consideration.

It would be unfortunate, perhaps amazing, if a legal fiction originally invented to prevent personalty from escaping just taxation, should compel us to accept the irrational view that the same securities were within two States at the same instant and because of this to uphold a double and oppressive assessment.

The judgment of the court below must be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

Concurring opinion of MR. JUSTICE STONE.

I concur in the result. It is enough to support it that, as stipulated in the record, the Virginia assessment was levied against a trustee domiciled in Maryland upon securities held by it in trust in its exclusive possession and control there, and so is forbidden as an attempt to tax property without the jurisdiction. *Brooke* v. *Norfolk*, 277 U. S. 27. But the question whether the Fourteenth Amendment forbids a tax on the beneficiaries, in Virginia, where they are domiciled, measured by their equitable interests, seems to me not to be presented by the record and so, under the settled rule of decision of this Court, ought not now to be decided. *Burton* v. *United States*, 196 U. S. 283, 296; *Blair* v. *United States*, 250 U. S. 273, 279; *Flint* v. *Stone Tracy Co.*, 220 U. S. 107; *Light* v. *United States*, 220 U. S. 523, 538.

No attempt was made by Virginia to tax the equitable interests of the beneficiaries of the trust. That the thing taxed or the measure of the tax is different from the equitable interests of the beneficiaries, as affected by the specified contingencies, sufficiently appears from the fact that the one may well have been of different value than the other. In fact, the securities seem to have been assessed at their full value although the equitable interests of the beneficiaries are less than the whole.

It may be that Virginia, following its own view of the nature of vested and contingent interests, might tax the interests of these beneficiaries as though they were the whole, but it is sufficient for present purposes that it has not assumed to do so. In the face of the present record we are not required to speculate how far a tax, forbidden because assessed upon property beyond the jurisdiction, may be upheld because it may be passed on to the bene-

ficiaries in Virginia and the equitable interests thus reached by indirection.

If the question were here I should not be prepared to go so far as to say that the equitable rights *in personam* of the beneficiaries of the trust might not have been taxed at the place of their domicile quite as much as a debt secured by a mortgage on land in another jurisdiction, notwithstanding the fact that the land is also taxed at its situs. See *Union Refrigerator Transit Co.* v. *Kentucky,* 199 U. S. 194, 205; *Bristol* v. *Washington County,* 177 U. S. 133; *Kirtland* v. *Hotchkiss,* 100 U. S. 491; *Savings Society* v. *Multnomah County,* 169 U. S. 421, 431. In neither case, if the threat of double taxation were controlling, which under the decisions it is not, *Fidelity & Columbia Tr. Co.* v. *Louisville,* 245 U. S. 54, 58; *Cream of Wheat Co.* v. *Grand Forks Co.,* 253 U. S. 325, 330; *Citizens Nat'l Bank* v. *Durr,* 257 U. S. 99, 109; cf. *Swiss Oil Corporation* v. *Shanks,* 273 U. S. 407, 413, would it seem that in any real sense is there double taxation, since the legal interests protected and taxed by the two taxing jurisdictions are different.

MR. JUSTICE BRANDEIS concurs in this opinion.

MR. JUSTICE HOLMES:

The Special Court of Appeals was plainly right in holding that the deed of trust conferred an absolute gift upon the two beneficiaries, perhaps, though I doubt it, subject to be divested upon a condition subsequent. Gray, Perpetuities, 1st ed., § 108. If the beneficiaries could be taxed at all they could be taxed for the whole value of the property, because the whole title was in them, even if liable to be divested at some future time in a not very probable event.

I am of opinion that on principle they can be taxed. In the first place I do not think that it matters that the owners, residing in Virginia, have only an equitable title. To be sure the trustee having the legal title and posses-

sion of the bonds in Maryland may be taxed there. But that does not affect the right of Virginia by reason of anything that I know of in the Constitution of the United States. *Bonaparte* v. *Tax Court,* 104 U. S. 592. *Kidd* v. *Alabama,* 188 U. S. 730, 732, 733. *Hawley* v. *Malden,* 232 U. S. 1, 13. *Cream of Wheat Co.* v. *Grand Forks,* 253 U. S. 325, 330. *Citizens National Bank* v. *Durr,* 257 U. S. 99, 109. *Blodgett* v. *Silberman,* 277 U. S. 1, 10. Compare with the last case *Wheeler* v. *Sohmer,* 233 U. S. 434.

I see no other fact to cut down Virginia's power. It is true that the conception of domicil has been applied to tangible personal property and it now is established that a State cannot tax the owner of such property if it is permanently situated in another State. But hitherto the decisions have been confined to tangibles that in a plain and obvious way owed their protection to another power. *Union Refrigerator Transit Co.* v. *Kentucky,* 199 U. S. 194, 206. It seemed to me going pretty far to discover even that limitation in the Fourteenth Amendment. It opens vistas to extend the restriction to stocks and bonds in a way that I cannot reconcile with *Blodgett* v. *Silberman,* 277 U. S. 1. Taxes generally are imposed upon persons, for the general advantages of living within the jurisdiction, not upon property, although generally measured more or less by reference to the riches of the person taxed, on grounds not of fiction but of fact. *Fidelity & Columbia Trust Co.* v. *Louisville,* 245 U. S. 54, 58. *Kirtland* v. *Hotchkiss,* 100 U. S. 491, 498. The notion that the property must be within the jurisdiction puts the emphasis on the wrong thing. The owner may be taxed for it although it never has been within the State. *Southern Pacific Co.* v. *Kentucky,* 222 U. S. 63. It seems to me going still further astray to rely upon the *situs* of the debt. A debt is a legal relation between two parties and, if we think of facts, is situated at least as much with the debtor against whom the obligation must be enforced as it is with the creditor. To say that a debt

has a *situs* with the creditor is merely to clothe a foregone conclusion with a fiction. The place of the property is not material except where inability to protect carries with it inability to tax. But that is an exceptional consequence. One State may tax the owner of bonds of another State, although it certainly contributes nothing to their validity. *Bonaparte* v. *Tax Court,* 104 U. S. 592. It is admitted that Maryland could tax the trustee in this case although most at least of the securities handed over were beyond the power of Maryland to affect in any substantial way. The equitable owners of the fund were in Virginia and I think they could be taxed for it there. I do not understand that any merely technical question is raised on the naming of the trustee instead of the *cestuis que trustent* as the party taxed. Nor is there any question of the amount. Throughout the record, by the Court and by the trustee, the single issue is stated to be whether the fund can be reached. In the words of the trustee it is: "Has such corpus, so created and held, a taxable situs in Virginia within the sanction of section one of the 14th Amendment to the Constitution of the United States?" I think the judgment should be affirmed.

UNITED STATES ET AL. *v.* ERIE RAILROAD COMPANY ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

No. 30. Argued November 1, 1929.—Decided November 25, 1929.

1. The Interstate Commerce Commission has power to establish rates on intrastate shipments which are part of foreign commerce. P. 100.
2. Whether a shipment is foreign or local is determined by the essential character of the commerce; it is not dependent upon the question when or to whom title passes; and the shipment may be

foreign in its entirety even though completed under a local bill of lading with a temporary detention before or after the local movement. P. 101.

3. The Commission found that the consignee of shipments from abroad acted only as agent of the consignors under a duty to reconsign the goods on a local bill of lading to their ultimate destination, in accordance with what it found to be the continuing intent from the time the goods were placed on board the steamers. There being ample evidence to support these findings, they should have been accepted by the District Court as conclusive; and the holding that the local movement was in fact a part of foreign commerce should not have been disturbed. P. 102.

32 F. (2d) 613, reversed.

APPEAL from a decree of the District Court setting aside and annulling an order of the Interstate Commerce Commission which required the establishment of a specific rate on shipments of imported wood pulp, from Hoboken, the place of importation, to another place in New Jersey.

Solicitor General Hughes, Assistant to the Attorney General O'Brian, and *Messrs. George C. Butte* and *Elmer B. Collins,* Special Assistants to the Attorney General, filed a brief on behalf of the United States.

Mr. Edward M. Reidy, with whom *Mr. Daniel W. Knowlton* was on the brief, for the Interstate Commerce Commission.

Mr. Marion B. Pierce, with whom *Mr. Herbert A. Taylor* was on the brief, for appellees.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

Upon complaint of Hamersley Manufacturing Company, the Interstate Commerce Commission issued an order that the Erie Railroad Company and a connecting carrier establish an all-rail rate of 10 cents per 100 pound

on wood pulp imported through the port of Hoboken, New Jersey, and shipped from there to Garfield, New Jersey, in carloads. *Hamersley Mfg. Co.* v. *Erie R. Co.*, 126 I. C. C. 491; 148 I. C. C. 47. The carriers brought this suit in the federal court for that State to enjoin enforcement of the order and to set it aside. The District Court granted the relief. *Erie R. Co.* v. *United States*, 32 F. (2d) 613. The case is here on direct appeal under Act of October 22, 1913, c. 32, 38 Stat. 208, 220, Act of February 13, 1925, c. 229, 43 Stat. 936, 938, amending § 238 of the Judicial Code. The sole ground for the carriers' attack on the order, and also the sole ground for the decree below, is that the shipments are wholly intrastate and, therefore, the Commission lacked jurisdiction over the rates.

The Commission found the following facts concerning the course of the business involved. The Hamersley Company makes to a New York broker, who is a commission agent for specified foreign mills, its offer to buy a certain quantity and grade of pulp manufactured abroad. The broker cables the offer to one of the foreign mills which he represents, naming the prospective purchaser. If the offer is accepted, the broker so informs the Company and then makes a contract with it in his own name, sending a copy to the mill. The contract provides for shipment from abroad during a specified period and delivery, at the agreed price, on dock New York Harbor. The mill is not named in the contract. It ships to the broker the ordered quantities marked with a brand, but not so as to show the individual customer, and cables the broker when the shipment is made, naming the steamer, the quantity, the customers, and the date of expected arrival. This information is communicated by the broker to the Company. It appears from the record that the broker pays the mill as soon as he is thus advised of the shipment; and that the ship's bill of lading is sent to him.

The pulp destined for the Company may be part of a larger shipment. But the number of bales allotted to it are always delivered at Garfield; none may be diverted to any other customer; and no pulp is shipped to the broker for sale to purchasers to be obtained while the pulp is in transit or after its arrival. Upon arrival of the pulp in Hoboken, the broker gives to a terminal company the dock orders, specifying delivery of the required number of bales, and makes out the bills of lading for shipment from there to Garfield. These papers name the ship by which the pulp arrived at the Hoboken dock. There may be some delay in forwarding the wood pulp by rail after delivery on the dock because, under an arrangement between the broker and the Company, the pulp is shipped from the dock in lots of two or three cars in order to prevent congestion at Garfield. The freight from the dock to Garfield is paid by the Company to the rail carrier. The Commission found "that from the time the pulp is placed on board steamers at foreign ports there is a continuing intent on the part of the shipper that it shall be transported to Garfield."

The carriers contend that title to the pulp does not pass to the Company until the broker arranges, at the Hoboken dock, for shipment of the specific lot to Garfield; that the shipment by the mill to its agent, as consignee, of pulp in quantity exceeding that ultimately destined to Garfield, terminates when the pulp is delivered on dock at Hoboken; that this foreign shipment is distinct from the subsequent shipment by the broker to Garfield of the smaller quantity, under a new and local bill of lading; and that therefore, the rail movement from Hoboken to Garfield is an independent intrastate transaction. But the nature of the shipment is not dependent upon the question when or to whom the title passes, *Pennsylvania R. Co.* v. *Clark Coal Co.*, 238 U. S. 456, 465–6. It is deter-

mined by the essential character of the commerce. *Baltimore & Ohio S. W. R. Co.* v. *Settle,* 260 U. S. 166, 170. It is not affected by the fact that the transaction is initiated or completed under a local bill of lading which is wholly intrastate, *Ohio R. R. Commission* v. *Worthington,* 225 U. S. 101, 108–110; *Texas & New Orleans R. Co.* v. *Sabine Tram Co.,* 227 U. S. 111; *Hughes Bros. Co.* v. *Minnesota,* 272 U. S. 469; or by the fact that there may be a detention before or after the shipment on the local bill of lading, *Carson Petroleum Co.* v. *Vial,* 279 U. S. 95. The findings of the Commission, that the broker acts only as agent and that from the time that the pulp is put aboard the steamer there is a continuing intent that it should be transported to Garfield, ought to have been accepted by the District Court as conclusive, since there was ample evidence to sustain them. *Western Paper Makers' Chemical Co.* v. *United States,* 271 U. S. 268; *Virginian R. Co.* v. *United States,* 272 U. S. 658. The rail transportation is in fact a part of foreign commerce.

Reversed.

CHESAPEAKE & OHIO RAILWAY COMPANY *v.* MIHAS.

CERTIORARI TO THE APPELLATE COURT FOR THE FIRST DISTRICT OF ILLINOIS AND THE SUPREME COURT OF ILLINOIS.

No. 21. Argued October 24, 1929.—Decided November 25, 1929.

1. A judgment of the Appellate Court of Illinois, which, under Cahill's Rev. Stats. Ill., 1927, c. 110, § 121, is final unless the judges of that court grant a certificate of importance and an appeal to the Supreme Court of the State, or the latter court grants an application for review, is affirmed when the Supreme Court refuses such an application and is then final for purposes of review in this Court, although no application for certificate of importance and appeal to that court has been made to the Appellate Court. P. 103.

2. It is not sufficient for a complainant to show that he has been injured by the failure of another to perform a duty or obligation unless that duty or obligation was one owing to the complainant. P. 106.
3. A railway employee, having occasion in the course of his duty to cross a switch-track, attempted to climb over one of several cars standing upon it and was thrown off and injured when, without warning, other cars were shunted forcibly against them. It was the custom of the railway company to give warning when such shunting was to be done, but only to persons, other than employees, engaged in unloading the standing cars; and there was no custom or duty of the kind in respect of employees engaged in work on or about the tracks. There was nothing to show that the employees engaged in the switching operation knew, or had reason to believe, that this employee was in any position of danger. *Held* that the failure to give warning, though he relied upon it, was not a breach of duty owed to him, and that he had no cause of action. P. 106.

249 Ill. App. 446, affirmed.

CERTIORARI, 279 U. S. 827, to review a judgment of the Appellate Court of Illinois affirming a verdict and judgment for damages in an action under the Federal Employer's Liability Act.

Mr. David H. Leake, with whom *Mr. Wm. G. Wise* was on the brief, for petitioner.

Mr. Joseph D. Ryan, with whom *Mr. John P. Bramhall* was on the brief, for respondent.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

Section 121, c. 110, Cahill's Revised Statutes of Illinois, 1927, provides that, except in cases where an appeal or writ of error will lie under the Constitution from the state appellate courts to the supreme court, the judgments of the former shall be final, except (1) in certain cases where, in the opinion of the appellate court judges, ques-

tions of importance are involved, such judges may grant appeals to the supreme court on petition, in which case the grounds for granting such appeals shall be certified, and (2) the supreme court may require such cases made final in the appellate courts to be certified for review and determination with the same effect as though carried up by appeal or writ of error. Application was made to the state supreme court for a writ to review the judgment of the appellate court in this case and was denied. The jurisdiction of this Court in granting the petition for a writ of certiorari is now attacked on the ground that petitioner did not exhaust its remedies under state law, because it failed also to apply to the appellate court for a certificate of importance and an appeal as provided in subdivision (1) above. In *Minneapolis, St. P. & S. S. M. R. Co.* v. *Rock*, 279 U. S. 410, we had under consideration the same question and held that the denial of an application for certiorari by the state supreme court was in effect an affirmance of the judgment, and that it would be unreasonable to require an application to the appellate court for a certificate of importance and appeal when the supreme court had thus approved the judgment. This Court, therefore, has jurisdiction; and we proceed to consider the merits.

The respondent brought an action in the superior court of Cook County to recover damages for a personal injury suffered while engaged as an employee of petitioner in interstate commerce. That court at the conclusion of the evidence denied a motion for a directed verdict in favor of petitioner. Upon a verdict of the jury, judgment was rendered for respondent, which the appellate court, on appeal, affirmed. 249 Ill. App. 446.

Petitioner seeks to reverse the judgment of the appellate court on the ground, among others, that there was no proof of negligence and the motion for a directed verdict should have been sustained.

Mihas was employed by the railway company to care for switch lights and lamps along the right of way, and had been thus employed for about four years prior to the injury. He had lived all that time near the switch tracks in the yards at Peru, Indiana. He was thoroughly familiar with the switching operations and with the fact that they were carried on every day, usually between the hours of six and seven o'clock in the morning. In doing his work he used a small speeder car, which was kept on the opposite side of the tracks from where he lived; and it was necessary for him to cross these tracks to get the car. About ten minutes before seven o'clock on the morning of the accident, as he came from his house, he saw two men with a truck going away from a coal car which they had been unloading. He testified that he looked to one side and the other, but did not see or hear any train or cars approaching. Proceeding directly from his house, on his way across the tracks to get the speeder car, he attempted to climb over a coal car standing with a number of others on a switch track. While in the act of doing so, a string of nine cars was forcibly propelled by means of a flying switch against the standing cars with such violence that Mihas was thrown between two cars and severely injured. The cars being switched moved at the rate of four or five miles per hour, which was not an unusual speed for that kind of an operation. Those engaged in the movement had no knowledge of Mihas' position or of his movements. One of the standing cars contained coal, and shortly prior to the switching operation the two men seen by Mihas had been engaged in unloading the coal into a truck, but at the time of the impact they had driven off and were some distance away from the standing cars. There was evidence to the effect that it was customary for train men personally to notify persons engaged in unloading cars before making a switching operation likely to affect them; but that such notice was exclusively for

men so engaged. Mihas testified that he knew of this practice. He heard no notice given to the men on the occasion in question; but whether he crossed the cars relying upon that fact the testimony does not make clear, although it is assumed in the briefs and arguments and we assume that he did. He could have crossed in a roundabout way without climbing over the cars, and his selection of the latter method was for his own convenience. Mihas testified that his foreman knew about his having to cross the tracks and had never told him not to cross between the cars; but there is no evidence that the foreman or any agent or employee of the company had knowledge that Mihas ever crossed by climbing over standing cars.

The negligence complained of is that in making the flying switch the standing cars were struck with great and unnecessary force; that it was the established custom of the railway company to give due notice and warning to all persons in or about such cars before moving or shunting other cars against the standing cars; and that such notice or warning was not given upon the occasion in question. The evidence, however, is that the notification or warning was exclusively for persons, not employees, engaged in unloading cars. There was no custom or duty of that kind in respect of employees engaged on or about the tracks. If there was a violation of duty, therefore, on the part of the railway company, it was not of a duty owing to Mihas; and the rule is well established that it is not sufficient for a complainant to show that he has been injured by the failure of another to perform a duty or obligation unless that duty or obligation was one owing to the complainant. In *Chesapeake & Ohio R. Co.* v. *Nixon*, 271 U. S. 218, the facts were that a section foreman whose employment obliged him to go over and examine the track was on a tour of inspection. For that purpose

he used a velocipede fitted to the rails. He was overtaken by a train and killed. The negligence charged was that the engineer and fireman of the train were not on the lookout; and the proof was to that effect. It was held that that duty was one which the railroad company might owe to others but not toward the class of employees to which the deceased belonged; and a recovery for his death was reversed. In *O'Donnell* v. *Providence & Worcester R. Co.*, 6 R. I. 211, it was held that a statute giving a right of action to one injured by the neglect of the railroad company to ring the locomotive bell before making a highway crossing was designed exclusively for the benefit of persons crossing the highway, and one injured while walking along the track not at a crossing could not recover under the statute. The court said (p. 214):

"If the defendants have violated any duty owing from them to the plaintiff, and by means or in consequence of that violation the plaintiff has suffered injury, he has a right to compensation and damages at the hands of the defendants for such injury. In the language of the books, an action lies against him who neglects to do that which by law he ought to do, (1 Vent. 265; L Salk. 335,) and that, whether the duty be one existing at common law, or be one imposed by statute. In order, however, to a recovery, it is not sufficient that some duty or obligation should have been neglected by the defendants, but it must have been a neglect of some duty or obligation to him who claims damages for the neglect. In 1 Comyns's Digest, Action upon Statute, F, it is said, 'In every case where a statute enacts or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage, or for the recompense of the wrong done to him contrary to said law,' confining the remedy to such things as are enacted for the benefit of the person suing."

See also, *Pheasant* v. *Director General of Railroads*, 285 Fed. 342, 344; *Cincinnati, N. O. & T. P. R. Co.* v. *Swann's Admx.*, 160 Ky. 458, 469.

There is nothing in the record to show that employees engaged in the switching operation knew or had reason to believe that Mihas was in any position of danger. In the absence of such knowledge or ground for belief, they were not required to warn him of the impending switching operation or take other steps to protect him. *Toledo, St. L. & W. R. Co.* v. *Allen*, 276 U. S. 165, 173.

The evidence failing to show negligence on the part of the company, the motion for a directed verdict in favor of the petitioner should have been granted.

Judgment reversed and cause remanded for further proceedings not inconsistent with this opinion.

WICK *v.* CHELAN ELECTRIC COMPANY.

APPEAL FROM THE SUPREME COURT OF WASHINGTON.

No. 29. Argued November 1, 1929.—Decided November 25, 1929.

1. Upon review of a decision of a state supreme court sustaining a service by publication on a non-resident land-owner in a condemnation case as conformable to a state statute, and rejecting the land-owner's contention that the period of time between service and the return day was too brief to satisfy the demands of due process under the Fourteenth Amendment, this Court accepts as binding upon it the state court's construction of the statute with respect to the time as of which service is complete and as to the manner of fixing the return day. P. 110.
2. Eighteen days between service by publication and the return day *held* sufficient time under the due process clause, as applied to a non-resident defendant in a suit to condemn land. *Id.*
3. Description of property in petition in condemnation proceedings *held* adequate under the due process clause. P. 111.
4. Where the validity of a state statute is challenged on the ground of its being repugnant to the due process clause of the Fourteenth

Amendment, but the contentions of appellant are unsubstantial, this Court is without jurisdiction to entertain an appeal from the state court. P. 111.

Appeal from 145 Wash. 129, 148 Wash. 479, dismissed.

APPEAL from a judgment of the Supreme Court of Washington upholding the constitutionality of a statute providing for service by publication upon non-resident owners of land in condemnation proceedings.

Messrs. Joseph D. Sullivan and *Adrien W. Vollmer* for appellant.

Mr. Edwin C. Matthias, with whom *Messrs. F. G. Dorety, Thomas Balmer, Charles S. Albert,* and *Frank T. Post* were on the brief, for appellee.

MR. JUSTICE BUTLER delivered the opinion of the Court.

Appellee, a public utility corporation organized under the laws of Washington, was empowered to acquire by eminent domain the right to use the water of Lake Chelan for the generation of electricity for public use, and to that end was authorized to impound and raise the water to 1100 feet above mean sea level. Appellant, a resident and citizen of Pennsylvania, owns shore land a part of which is overflowed by the water so raised. Appellee instituted condemnation proceedings in the Superior Court of Chelan County. The petition showed that the purpose was to acquire the right so to raise the water and inundate appellant's land. Notice was published as required. And later appellee filed a bill of particulars describing by metes and bounds the land to be condemned. The court found the taking to be in the public interest, fixed compensation for appellant and by its decree appropriated to the use of appellee the right in perpetuity to overflow such land. The judgment was affirmed in the highest court of the

State. 145 Wash. 129. 148 Wash. 479. Appellant seeks review under § 237(a) of the Judicial Code. U. S. C., Tit. 28, § 344(a).

Under the laws of Washington (Remington's Compiled Statutes, 1922, § 921 *et seq.*) condemnation proceedings are instituted by the presentation of a petition to the superior court of the county in which is located the property proposed to be taken. Notice is required to be given to those interested as owners or otherwise. § 922. The substance of the provision here attacked follows. "In all cases where the owner . . . is a nonresident of this state . . . service [of the notice] may be made by publication thereof in any newspaper published in the county where such lands are situated, once a week for two successive weeks . . . And such publication shall be deemed service upon each such nonresident . . ." September 22, 1926, appellee filed a notice that its petition for condemnation would be presented to the court October 11. A notice to that effect was published in a newspaper of the county on September 23, September 30 and October 7. Appellant appeared specially, objected to the jurisdiction of the court, moved to quash the service and challenged the validity of the statute on the ground of its being repugnant to the due process clause of the Fourteenth Amendment.

She says that the service was not complete until two weeks after the first publication and, relying on *Roller* v. *Holly*, 176 U. S. 398, insists that the time allowed is not sufficient. But the supreme court distinguished the Texas statute considered in that case from that of Washington now before us, construed the latter not to require publication for successive weeks and not to prescribe the period of time required to elapse between the giving of the notice and the return day, held that the first publication constituted service and that the intervening eighteen days was sufficient. That court's construction of the state

statute is authoritative. No discussion is required to show that the time so allowed is reasonable. There is no ground on which it may be contended that the statute as construed is repugnant to the due process clause. *Huling* v. *Kaw Valley R. & I. Co.*, 130 U. S. 559, 563. *Bellingham Bay & B. C. R. Co.* v. *New Whatcom*, 172 U. S. 314, 319. *Ballard* v. *Hunter*, 204 U. S. 241, 254, 262. *Goodrich* v. *Ferris*, 214 U. S. 71, dismissing an appeal from the Circuit Court of Appeals (145 Fed. 844) for lack of jurisdiction.

And appellant asserts that as construed in this case the provision of § 922 requiring that the petition shall contain a description of the property proposed to be taken is also repugnant to the due process clause. But mere inspection of the petition shows that the point is utterly devoid of merit.

No attempt was made below to draw in question the validity of any other provision of the state statutes. And, as appellant's contentions above referred to are unsubstantial, this court is without jurisdiction. *Goodrich* v. *Ferris, supra*, 79. *Trenton* v. *New Jersey*, 262 U. S. 182, 192. *Newark* v. *New Jersey*, 262 U. S. 192, 196. *Campbell* v. *Olney*, 262 U. S. 352, 354.

Appeal dismissed.

HERBRING v. LEE, INSURANCE COMMISSIONER OF OREGON.

APPEAL FROM THE SUPREME COURT OF OREGON.

No. 17. Argued October 23, 24, 1929.—Decided November 25, 1929.

1. The Oregon law (2 Ore. L. Tit. 36, § 6388), requiring each foreign fire insurance company to do its local business through licensed local agents; restricting the number of agents that may be appointed by a company in any city, and providing that, as a condition precedent to appointment of an additional agent in a city the company shall apply to the Insurance Commissioner and pay an annual license fee of $500, is a regulation of the corporation

and not an attempted regulation of or an interference with the rights of individuals to carry on the business of insurance agent. P. 116.

2. Whether this regulation is arbitrary and unconstitutional as applied to the corporation is not open for decision in the absence of any assignment of error raising that question, in a suit maintained solely by an individual for the assertion of his personal interest in being appointed the company's agent. P. 117.

126 Ore. 588, affirmed.

APPEAL from a judgment of the Supreme Court of Oregon which reversed a judgment ordering the State Commissioner of Insurance to issue to the present appellant a license to act as agent of a fire insurance company without payment of the license fee required of the company by statute.

Mr. Thomas MacMahon presented the oral argument, and *Messrs. Karl Herbring, pro se,* and *Guy E. Kelly* filed a brief for appellant.

Messrs. I. H. Van Winkle, Attorney General of Oregon, and *Willis S. Moore,* Assistant Attorney General, were on the brief for appellee.

MR. JUSTICE SANFORD delivered the opinion of the Court.

This case arose under the Insurance Law of Oregon. 2 Oregon Laws, Tit. 36, §§ 6322 to 6604. Section 6388 of this Law provides, *inter alia,* as follows:

(1) "It shall be unlawful for any fire insurance company doing business in the state of Oregon to write, place or cause to be written or placed, any policy or contract for indemnity or insurance on property situated or located in the state of Oregon, except through or by the duly authorized agent or agents of such insurance company residing and doing business in this state, to whom the premium on such insurance shall be paid . . .";

(4) "Every insurance company licensed to transact a fire insurance business in this state and lawfully doing such business therein, may, in respect thereof, establish agencies in this state, to consist of but one agent for each city, town or village in the state . . . and additional agencies as hereinafter provided, and the name of every agent appointed, in accordance with the provisions of this section shall be filed with the insurance commissioner immediately upon the making of such appointment by any such company. The insurance commissioner shall thereupon issue to each such agent . . . qualified as provided in this act a certificate setting forth that such agent is entitled to act for the company appointing him for the balance of the current year . . . The fee fixed for issuing such certificate shall be $2 and shall be paid to the insurance commissioner . . .";

(7) "Any such insurance company . . . may appoint one additional agent . . . in any city of this state having a population of fifty thousand or more inhabitants according to the last federal census . . .";

(8) "Any such insurance company may appoint an additional agent or agents . . . in any city of this state on application to the insurance commissioner and the payment of an annual license fee of five hundred dollars for each such agent."

Herbring, a resident and practising attorney in the city of Portland, Oregon, in good standing, applied to Lee, the Insurance Commissioner of Oregon, for an agent's license to represent the Northwestern National Insurance Company of Milwaukee—a foreign corporation duly qualified to write policies of fire insurance in Oregon, and already having two agents in Portland. The application—upon which the Company had indorsed its approval—was accompanied by Herbring's check for $2 as payment for a license fee. The Commissioner returned

this application to the Company, stating that he could not accept an application direct from Herbring and requesting that the Company make the application. The Company itself thereupon executed an application for a license to Herbring to represent it as agent in Portland, and sent this to the Commissioner, but without the payment of any fee or any offer of such payment. The Commissioner returned this application to the Company, stating that as it already had two agents in Portland, its request for an additional license to Herbring could not be granted unless it wished to pay the additional fee of $500 prescribed by the Oregon law. On the same day the Commissioner returned Herbring's check and advised him that his application had been returned to the Company as he would make a third agency for the Company in Portland, " and this is not permissible under the Oregon Insurance Laws, unless the additional fee of $500 is paid for such license."

The Company, so far as appears, neither replied to the Commissioner, nor paid or tendered the $500 fee, nor questioned the validity of this requirement. Herbring, however, appealed to the Circuit Court of the county from the decision of the Commissioner refusing to issue to him a license as an agent for the Company. See § 6335. The Company was not a party to this appeal. The court—which heard the matter without pleadings—finding that the Company's application for the appointment of Herbring to act as an additional agent was denied by the Commissioner for the reason that it refused to pay the license fee of $500 required by subd. 8 of § 6388 to be paid by any insurance company appointing an additional agent, and that this provision is " void and unconstitutional and an unlawful interference with the right of said agent to engage in the business of selling fire insurance in the State of Oregon and with the right of said

insurance company to appoint such agent, except upon the payment of said additional license fee," ordered the Commissioner to issue a license to Herbring to act as agent for the Company in Portland, without requiring the Company to pay $500 as a license fee for such appointment.

On an appeal by the Commissioner from this order, the Supreme Court of Oregon held that the payment of the $500 fee is required by § 6388 "as a condition precedent to the right of any fire insurance company to appoint such additional agent"; that, "a foreign corporation being required to comply with the statute, in order to be entitled to appoint agents and consummate its business in the state of Oregon, it follows . . . that in order for an agent to obtain a license to represent such a foreign corporation there must first be a compliance by the foreign corporation with the requirements of our state law," and that "the rights of one applying for a license to act as agent for such insurance company are contingent upon the compliance of the company with conditions precedent to its right to appoint such an agent"; and further, that subd. 8 of § 6388 is not repugnant to either the privileges and immunities clause or the equal protection clause of the Fourteenth Amendment, but is a valid legislative requirement of a foreign insurance company in the conduct of its business in Oregon. The judgment of the Circuit Court was accordingly reversed, and the proceeding dismissed. 126 Ore. 588.

From this judgment Herbring was allowed an appeal to this Court. The only Federal question presented by his assignments of error is that the Supreme Court of Oregon "erred in holding that Sub-div. 8 of § 6388 of the Oregon Laws does not abridge the rights of the appellant Karl Herbring, guaranteed by § 1 of the 14th Amendment to the Constitution of the United States."

1. In support of this assignment the appellant takes the position that the obtaining of an agent's license, while a condition precedent to the right of the agent to do business, has no bearing whatever upon the rights and privileges of the corporation, and that the statute "is an unreasonable and unwarrantable interference with the right of the individual to carry on a legitimate business, and class legislation in that it is an attempt to monopolize the insurance agency business," and "in reality not a corporate regulation, but an unconstitutional attempt to deprive the individual of his common law right to follow an inherently lawful occupation."

This position is not well taken. Subd. 8 of § 6388, as appears upon its face and from the entire context, is not directed against individual insurance agents and imposes no restrictions upon them, but is, as construed by the Supreme Court of the State, a provision requiring the insurance company itself to pay a $500 fee as a condition precedent to its right to appoint an additional agent to represent it in any city. To exercise this right, as indicated by the statute, it must apply to the Insurance Commissioner and pay the additional license fee for such agent. It is plainly no interference whatever with the right of the individual to carry on the business of an insurance agent, or class legislation in this respect. It is obvious that, as pointed out by the Supreme Court of Oregon, in order that an agent may be licensed to represent a company there must first be a compliance by the company with the requirement of the statute; the right of one applying for a license to act as an agent for the company being contingent upon such compliance. No one has the right to receive a license to represent a company as its agent, when the company itself has no right to appoint him. And the contention that the statute is an unconstitutional interference with the individual

rights of Herbring himself in conducting the business of an insurance agent, is without merit.

2. The appellant also urges in argument, that "if the statute be regarded as a corporate regulation, rather than as an individual prohibition, it is unconstitutional, in that it is unreasonable, arbitrary and capricious" and cannot be sustained under the police power of the State. In other words, he seeks in argument to challenge the validity of the statute on the ground that it is an infringement of the Company's constitutional right to appoint an additional agent. The Company itself is not here insisting that the statute constitutes an impairment of its own right; it raised no such question before the Commissioner, and for aught that appears acquiesced in that officer's view of the validity of the statute.

It may well be that under the facts in this case Herbring's individual interest in this question is not direct but merely collateral and remote and not such as would have entitled him to challenge the constitutional validity of the statute on the ground that it is an impairment of the Company's own rights. But, however that may be, there is no assignment of error here which challenges the validity of the statute on that ground; and the question which Herbring seeks to raise in argument, is not before us for decision.

The judgment is

Affirmed.

SILVER *v.* SILVER.

APPEAL FROM THE SUPREME COURT OF ERRORS OF CONNECTICUT.

No. 24. Argued October 25, 1929.—Decided November 25, 1929.

1. Where the record does not disclose the federal grounds on which a state statute was challenged in the state court, review will be

limited to those which were considered in the state court's opinion. P. 122.

2. The Constitution does not forbid the abolition of old rights recognized by the common law, to attain a permissible legislative object. P. 122.
3. A state statute providing that no person carried gratuitously as a guest in an automobile may recover from the owner or operator for injuries caused by its negligent operation, is not in conflict with the equal protection clause of the Fourteenth Amendment because of the distinction it makes between passengers so carried in automobiles and those in other classes of vehicles. P. 122.
4. A statutory classification may not be declared forbidden as arbitrary unless grounds for the distinction are plainly absent. P. 123.
5. Conspicuous abuses, such as the multiplicity of suits growing out of the gratuitous carriage of passengers in automobiles, may be regulated by the legislature without regulating other like, but less conspicuous, examples. P. 123.

108 Conn. 371, affirmed.

APPEAL from a judgment of the Supreme Court of Errors of Connecticut affirming a judgment for the defendant in an action to recover for injuries caused by negligence in the operation of an automobile.

Mr. Thomas R. Robinson, with whom *Messrs. David M. Reilly, Herman Levine,* and *Arthur B. O'Keefe* were on the brief, for appellant.

The classification made by such a statute must have a reasonable and adequate relation to the object of the legislation. *Atchison, T. & S. F. R. Co.* v. *Vosburg,* 238 U. S. 56; *Fountain Park Co.* v. *Hensler,* 199 Ind. 95; *Chicago, M. & St. P. R. Co.* v. *Westby,* 102 C. C. A. 65; *People* v. *Beakes Dairy Co.,* 222 N. Y. 416; *Quaker City Cab Co.* v. *Pennsylvania,* 277 U. S. 389; *Southern R. Co.* v. *Greene,* 216 U. S. 400; *Gulf, C. & S. F. R. Co.* v. *Ellis,* 165 U. S. 150; *Louisville G. & E. Co.* v. *Coleman,* 277 U. S. 32; *Power Mfg. Co.* v. *Saunders,* 274 U. S. 490; *Barbier* v. *Connolly,* 113 U. S. 27; *Missouri, K. & T. R. Co.* v. *May,* 194 U. S. 267.

The distinctions attempted to be made between corporations, domestic and foreign, in *Southern R. Co.* v. *Greene,* 216 U. S. 400, and *Power Mfg. Co.* v. *Saunders,* 274 U. S. 490; between a corporation doing no business in a State and those doing business therein in *Royster Guano Co.* v. *Virginia,* 253 U. S. 412; between corporations and individuals in *Quaker City Cab Co.* v. *Pennsylvania,* 277 U. S. 389; and *Frost* v. *Corp'n Comm'n,* 278 U. S. 515; between mortgage loans of varying terms in *Louisville G. & E. Co.* v. *Coleman,* 277 U. S. 32; between gifts *inter vivos* made at different times before death in *Schlesinger* v. *Wisconsin,* 270 U. S. 230; between railroads as defendants and other defendants in *Gulf, C. & S. F. R. Co.* v. *Ellis,* 165 U. S. 150, and *Atchison, T. & S. F. R. Co.* v. *Vosburg,* 238 U. S. 56; between the relation of former employer and employee and persons not in such relation in *Truax* v. *Corrigan,* 257 U. S. 312; between telegraph companies and others using similar equipment in *Vigeant* v. *Postal Telegraph Co.,* 260 Mass. 335; between motor vehicles of varying weights and uses in *Lossing* v. *Hughes,* 244 S. W. 556; *Consumer's Co.* v. *Chicago,* 298 Ill. 339; *Franchise Motor Freight Ass'n* v. *Seavey,* 196 Cal. 77, and *Kellaher* v. *Portland,* 57 Ore. 575; and between miners and manufacturers and other persons in *State* v. *Goodwill,* 33 W. Va. 179, are all of a more substantial nature than the classification attempted by this statute.

Messrs. David E. Fitzgerald, Wm. L. Hadden, Ellsworth B. Foote, and *Benjamin Slade,* were on the brief for appellee.

Assuming, as we must, the power of the legislature to regulate the operation of motor vehicles, it includes the power to enact legislation affecting the reciprocal rights and duties of all who use them, whether he be owner, operator or occupant, where these rights and duties arise out of such operation. *Buelke* v. *Levenstadt,* 190 Cal.

684; *Hartje* v. *Moxley,* 235 Ill. 164; *West* v. *Asbury,* 89 N. J. L. 402; *Opinion of the Justices,* 251 Mass. 569; *Packard* v. *Banton,* 264 U. S. 140; *Minnesota Iron Co.* v. *Kline,* 199 U. S. 593.

Since motor vehicles have come into general use they have been classified separately from other methods of transportation, and the power of the legislature to impose upon their owners and operators duties different from those of owners and operators of other vehicles has been generally upheld. Berry, Automobiles, Vol. 1, § 30; *Garrett* v. *Turner,* 235 Pa. St. 383; *Westfall* v. *Chicago,* 280 Ill. 318; *Hendrick* v. *Maryland,* 235 U. S. 615.

The fact that the law applies only to motor vehicles does not create an unreasonable classification of vehicles using the road, is not an unlawful discrimination against a particular class, and does not deny the equal protection of the law guaranteed by the Fourteenth Amendment. *Christy* v. *Elliott,* 216 Ill. 31; *Hendrick* v. *Maryland, supra; State* v. *Mayo,* 106 Me. 62; *State* v. *Swagerty,* 203 Mo. 517.

There is nothing arbitrary or unreasonable in applying a different standard of duty toward a gratuitous passenger in a motor vehicle as distinguished from one being transported for compensation—hence the exception of the common carrier by the statute is valid. *Massalette* v. *Fitzroy,* 228 Mass. 508; *Giblin* v. *McMullen,* L. R. 2 P. C. 317; *Moffatt* v. *Bateman,* L. R. 3 P. C. 115.

One owning and operating a motor vehicle upon the highways of the State of Connecticut is exercising a privilege and not a right, and it is competent for the legislature to prescribe the conditions upon which said privilege shall be exercised. *Commonwealth* v. *Kingsbury,* 199 Mass. 542; *People* v. *Fodera,* 33 Cal. App. 8; *People* v. *Rosenheimer,* 209 N. Y. 115; *Ruggles* v. *State,* 120 Md. 553.

The legislature of the State of Connecticut may prohibit altogether the use of motor vehicles upon the highways

within its borders. *Doyle* v. *Continental Ins. Co.*, 94 U. S. 535; *State* v. *Mayo*, 106 Me. 62; *Stone* v. *Mississippi*, 101 U. S. 814; *Otis* v. *Parker*, 187 U. S. 606; *People* v. *Rosenheimer*, 209 N. Y. 115.

The deprivation of a common law right does not make the Act unconstitutional, for a legislature may suspend the operation of general law. *Buelke* v. *Levenstadt*, 190 Cal. 684; *Carrozza* v. *Finance Co.*, 149 Md. 223.

In a classification for governmental purposes, there cannot be an exact exclusion or inclusion of persons and things. *Orient Ins. Co.* v. *Daggs*, 172 U. S. 562. Technical inequalities do not offend against the equal protection clause of the Fourteenth Amendment. *Louisville & N. R. Co.* v. *Melton*, 218 U. S. 52; *Lindsley* v. *Gas Co.*, 220 U. S. 78.

Mr. Justice Stone delivered the opinion of the Court.

This is an appeal under § 237 of the Judicial Code, as amended by Act of February 13, 1925, from a judgment of the Supreme Court of Connecticut upholding the constitutionality of a state statute. Chapter 308 of the Public Acts of Connecticut of 1927 (printed in the margin [1])

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[1] Chapter 308. *An Act releasing owners of motor vehicles from responsibility for injuries to passengers therein.*

Be it enacted by the Senate and House of Representatives in General Assembly convened:

Section 1. No person transported by the owner or operator of a motor vehicle as his guest without payment for such transportation shall have a cause of action for damages against such owner or operator for injury, death or loss, in case of accident, unless such accident shall have been intentional on the part of said owner or operator or caused by his heedlessness or his reckless disregard of the rights of others.

Sec. 2. This act shall not relieve a public carrier or any owner or operator of a motor vehicle while the same is being demonstrated to a prospective purchaser of responsibility for any injuries sustained by a passenger being transported by such public carrier or by such owner or operator.

provides that no person carried gratuitously as a guest in an automobile may recover from the owner or operator for injuries caused by its negligent operation. The appellant brought suit in the Superior Court of New Haven County against appellee, her husband, for injuries so sustained. Judgment for the defendant was affirmed by the Supreme Court. Both courts ruled that the statute barred appellant, a guest carried gratuitously, from recovery for injuries caused by ordinary negligence in the operation of the car, and the Supreme Court, by divided bench, held that the statute did not deny to appellant the equal protection of the laws guaranteed by the Fourteenth Amendment.

As the record does not disclose the constitutional grounds on which the appellant challenged the validity of the statute, our review will be limited to the single question arising under the Federal Constitution which was considered in the opinion of the court below. *Saltonstall* v. *Saltonstall,* 276 U. S. 260. We need not, therefore, elaborate the rule that the Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object. See *Louis Pizitz Dry Goods Co.* v. *Yeldell,* 274 U. S. 112, 116; *New York Central R. Co.* v. *White,* 243 U. S. 188; *Mountain Timber Co.* v. *Washington,* 243 U. S. 219; *Wilmington Mining Co.* v. *Fulton,* 205 U. S. 60, 74.

The use of the automobile as an instrument of transportation is peculiarly the subject of regulation. We can not assume that there are no evils to be corrected or permissible social objects to be gained by the present statute. We are not unaware of the increasing frequency of litigation in which passengers carried gratuitously in automobiles, often casual guests or licensees, have sought the recovery of large sums for injuries alleged to have

been due to negligent operation. In some jurisdictions it has been judicially determined that a lower standard of care should be exacted where the carriage in any type of vehicle is gratuitous. See *Massaletti* v. *Fitzroy,* 228 Mass. 487; *Marcienowski* v. *Sanders,* 252 Mass. 65; *Epps* v. *Parrish,* 26 Ga. App. 399. Whether there has been a serious increase in the evils of vexatious litigation in this class of cases, where the carriage is by automobile, is for legislative determination and, if found, may well be the basis of legislative action further restricting the liability. Its wisdom is not the concern of courts.

It is said that the vice in the statute is not that it distinguishes between passengers who pay and those who do not, but between gratuitous passengers in automobiles and those in other classes of vehicles. But it is not so evident that no grounds exist for the distinction that we can say *a priori* that the classification is one forbidden as without basis, and arbitrary. See *Clarke* v. *Deckebach,* 274 U. S. 392, 397.

Granted that the liability to be imposed upon those who operate any kind of vehicle for the benefit of a mere guest or licensee is an appropriate subject of legislative restriction, there is no constitutional requirement that a regulation, in other respects permissible, must reach every class to which it might be applied—that the legislature must be held rigidly to the choice of regulating all or none. *Patsone* v. *Pennsylvania,* 232 U. S. 138, 144; *Miller* v. *Wilson,* 236 U. S. 373, 382, 384; *International Harvester Co.* v. *Missouri,* 234 U. S. 199, 215; *Barrett* v. *Indiana,* 229 U. S. 26, 29 (1913). In this day of almost universal highway transportation by motor car, we cannot say that abuses originating in the multiplicity of suits growing out of the gratuitous carriage of passengers in automobiles do not present so conspicuous an example of what the legislature may regard as an evil, as to justify

legislation aimed at it, even though some abuses may not be hit. *Carroll* v. *Greenwich Ins. Co.*, 199 U. S. 401, 411; *Bryant* v. *Zimmerman*, 278 U. S. 63, 73. It is enough that the present statute strikes at the evil where it is felt and reaches the class of cases where it most frequently occurs.

Affirmed.

BROMLEY *v.* McCAUGHN, COLLECTOR OF INTERNAL REVENUE.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 27. Argued October 31, 1929.—Decided November 25, 1929.

1. The tax imposed by Revenue Act of 1924, §§ 319–324, as amended by Revenue Act of 1926, § 324, upon transfers of property by gift, is not a direct tax within the meaning of the Constitution, but an excise on the exercise of one of the powers incident to ownership, and need not be apportioned. Const., Art. I, §§ 2, 8, 9. P. 135.
2. The uniformity of taxation throughout the United States enjoined by Art. I, § 8, is geographic, not intrinsic. P. 138.
3. The graduations of the tax, and the exemption of gifts aggregating $50,000 gifts to any one person that do not exceed $500, and certain gifts for religious, charitable, educational, scientific and like purposes, are consistent with the uniformity clause, and with the due process clause of the Fifth Amendment. *Id.*
4. The schemes of graduation and exemption in the statute, by which the tax levied upon donors of the same total amounts may be affected by the size of the gifts to individual donees, are not so arbitrary and unreasonable as to deprive the taxpayer of property without due process. P. 139.

ANSWERS to questions certified by the Circuit Court of Appeals upon review of a judgment for the Collector in a suit by Bromley, a resident of the United States, to recover a tax alleged to have been illegally levied upon gifts made by him.

Mr. Ira Jewell Williams, with whom *Messrs. Ira Jewell Williams, Jr.,* and *Francis Shunk Brown* were on the brief, for Bromley.

I. The gift tax is a direct tax, and hence void because unapportioned.

It should be noted that the words "or other direct" (in Art. I, § 9, cl. 4,) did not appear in the first draft of the Constitution, but were inserted so as to make it clear that Congress had no power to lay direct taxes without apportionment.

A tax upon income is a direct tax (*Pollock* v. *Farmers' Loan & Trust Co.,* 157 U. S. 429; 158 U. S. 601) permitted only because the Sixteenth Amendment removed the prohibition against the levying of that particular tax. *Eisner* v. *Macomber,* 252 U. S. 189.

That the gift tax is not an income tax (it is payable by the donor), and is not apportioned, is so obvious as not to require argument.

Making a gift is a right, not a privilege. Whether one regards "property" as the sum of the legal rights of the owner in respect of the object; or whether one regards the rights incident to ownership of property as necessarily flowing from the nature of the legal concept of "property"—in either case the faculty of making a gift is one of the rights of the owner of property. 1 Wend. Blackstone's Commentaries, c. 1, p. 138; *Todd* v. *Wick Bros.,* 36 Oh. St. 370; *Chicago & W. I. R. Co.* v. *Englewood Connecting R. Co.,* 115 Ill. 375; *Jaynes* v. *Omaha Street R. Co.,* 53 Neb. 631; *Smith* v. *Campbell,* 10 N. C. 595; *Eaton* v. *B. C. & M. R. Co.,* 51 N. H. 504; *Buchanan* v. *Warley,* 245 U. S. 60.

Of course the whole is the sum of all its parts; and if the Constitution protects property, it protects each of the incidents thereof. The gift tax, since it is a tax upon an essential right inherent in property, is a tax upon prop-

erty, and is therefore direct. A tax upon property, as slaves, is a direct tax. *Springer* v. *United States,* 102 U. S. 586.

Even if the tax be only upon the income from property, still it is a tax upon property. *Pollock* v. *Farmers' Loan & Trust Co., supra.*

So, a tax upon liquor is a tax upon property, even though the tax be disguised as an excise tax upon the "business" of withdrawing liquor from warehouses. *Dawson* v. *Kentucky Distilleries,* 255 U. S. 288. See *Thompson* v. *Kreutzer,* 112 Miss. 165; *Buchanan* v. *Warley,* 245 U. S. 60; *People* v. *Otis,* 90 N. Y. 48.

The right to use and to enjoy one's property comprehends the right of gift. The right of gift is part and parcel of all the other elements of property, and is one of the most deeply rooted.

The argument that unless all the incidents of property are taxed, the tax is not direct, is unsound. It is opposed to the principle of the *Pollock* case and the *Dawson* case, that a tax upon any one of the essential incidents of property is a tax upon property.

If a tax may be laid on one essential attribute of property because that attribute is not the only one, then there is no limit worthy the name to the power to tax property. Idle property may be taxed because it is idle. One's own home may be taxed because one is living in it. Lands planted to certain crops may be taxed—because there are "other useful purposes" to which the land could be put. To receive income from property is not the sole use to which property can be put. Yet a tax on income from property is a tax on property itself.

If the remunerative business use of property—putting money out at interest—owning and receiving the interest on securities; receiving the rental from property—could not be taxed except for the Sixteenth Amendment, be-

cause that would be to tax the property itself, *a fortiori* a non-business, non-remunerative, purely social use of property, that is, the exercise of the primitive right to give it away, may not be taxed, for that would be to tax the property itself. Analyzing and refuting *Anderson* v. *McNeir,* 16 F. (2d) 970.

The theory that there cannot be a taking of property unless the property is taken *in toto*—that a tax on an ordinary user of an indispensable attribute of property is not a tax on property unless it excludes every other user—is wholly untenable. Any serious diminution of the enjoyment of property is a "taking." *Portsmouth Co.* v. *United States,* 260 U. S. 327; *Peabody* v. *United States,* 231 U. S. 531.

Likewise, there can be a taxing of property without a taxing of all the attributes of property, or excluding every other possible user. A tax on the use of land for agricultural products would not preclude all other uses of the property, yet it would be a tax on property. Is not "keeping" a use—the right to decide not to spend, or invest, or give away? One may spend, trade, hoard or give. All these may be regarded as "uses." One may keep, or part with by spending, or by investing or giving. The owner of whiskey has a right to hoard it. That might be one use; but he may not be taxed by a State on the "business" of withdrawing it. *Dawson* v. *Kentucky Distilleries, supra.*

Investing is a use. Could there be a graduated excise tax on spending? Land lying fallow may be said to be "used." Could there be a valid "excise" tax on unused land?

Courts have rarely attempted to define direct or indirect taxes, but have preferred to decide in each case as it arose. The true rule is that the nature of the tax depends upon the nature of the thing taxed. If the tax

is a tax upon a person or upon property, it is a direct tax; if on a privilege, it is an excise and is indirect.

Indirect taxes can be divided into three classes: (a) inheritance taxes; *New York Trust Co.* v. *Eisner,* 256 U. S. 345; (b) business taxes; *Pacific Ins. Co.* v. *Soule,* 7 Wall. 433; *Veazie Bank* v. *Fenno,* 8 Wall. 523; *Nicol* v. *Ames,* 173 U. S. 509; *Treat* v. *White,* 181 U. S. 264; *Patton* v. *Brady,* 184 U. S. 608; *Thomas* v. *United States,* 192 U. S. 363; *Spreckels Sugar Co.* v. *McClain,* 192 U. S. 395; *McCray* v. *United States,* 195 U. S. 27; *Flint* v. *Stone Tracy Co.,* 220 U. S. 107; (c) luxury taxes; *Patton* v. *Brady,* 184 U. S. 608; *McCray* v. *United States,* 195 U. S. 27; *Billings* v. *United States,* 232 U. S. 261; *Hylton* v. *United States,* 3 Dall. 171.

Business taxes seem to have been held to be indirect for three reasons: (1) because most of them were technically taxes on some activity which the Government might well have had the power to regulate under some conferred power other than the power to tax; (2) because technically the tax need not be assumed, since doing the act taxed was a matter of volition of the person concerned; and (3) on the ground that the tax could be shifted to the ultimate consumer, who thus paid the tax indirectly in the form of an increased price for some article of consumption.

It is impossible too strongly to emphasize that indirect taxes are essentially business taxes. Except for inheritance taxes and an isolated instance or two of luxury taxes, every kind of indirect tax is connected in some way with some matter of business, as that word is commonly understood, from the simple transaction of a sale of real estate to the most complicated form of occupation tax. The business element is ever present. It is obvious that the gift tax is not in any sense a business tax.

This Court intimated in *Nicol* v. *Ames,* 173 U. S. 509, that a general tax on all sales would be direct.

Hylton v. *United States,* 3 Dall. 171, was fully analyzed and considered in the majority opinions in the *Pollock* cases. If a tax on property is not a direct tax, then a tax on the income from property could not be a direct tax. The carriage tax was sustained by Mr. Justice Chase (p. 175) as a tax on "expense . . . on . . . a consumable commodity." The tax here is not in any sense a tax on an expense.

II. The tax is arbitrary and unreasonable because graduated and otherwise lacking in uniformity. *Schlesinger* v. *Wisconsin,* 270 U. S. 230.

As applied to gifts, a graduated excise is a plain abomination. Graduation is not uniformity; uniformity here means sameness. If a man who owned 100 acres were placed in a different class and taxed at a rate twice as high as his neighbor owning fifty acres, would he have the equal protection of the laws? *Myles Salt Co.* v. *Drainage District,* 239 U. S. 478; *Gast Realty Co.* v. *Schneider Granite Co.,* 240 U. S. 55; *Cope's Estate,* 191 Pa. 1; *Smith* v. *Loughman,* 245 N. Y. 486.

If a general sales tax were passed taxing only sales over $500, and graduated so as to hit hardest the largest concerns, would such a tax, state or federal, be valid as "due process" or "equal protection"?

The gift tax taxes part of the remaining capital of the giver in a ratio graduated according to his generosity. Moreover, the act discriminates between residents and non-residents. A resident citizen is allowed a general exemption of $50,000. No such exemption is allowed to a non-resident. On the other hand, there is a discrimination against the resident citizen. He is taxed on all transfers of "property wherever situated," while the non-resident citizen is taxed only on transfers of "property situated within the United States."

In addition the tax makes an arbitrary discrimination based upon the amount of individual gifts. "Gifts the

aggregate amount of which to any one person does not exceed $500" per annum are exempt. $51,000 may be equally divided among 102 people without tax. If divided amongst 101 persons, the donor is taxable. The foregoing would seem to be not only unreasonable, but reasonless.

The same rule as to equality as inherent in the nature of a tax must apply alike to state legislatures and to Congress. Unreasonable, arbitrary classification violates "due process" quite as much as it violates the equal protection clause. Cf. the *Pollock* case, 157 U. S. at p. 504, and pp. 595–6.

This salutary rule applies with equal force to an attempt to graduate so-called "taxes" according to the size of the subject matter irrespective of any difference in nature or quality. *Frost* v. *Corp'n Comm'n,* 278 U. S. 515.

Solicitor General Hughes, with whom *Messrs. Sewall Key* and *J. Louis Monarch,* Special Assistants to the Attorney General, were on the brief, for McCaughn.

I. The tax upon transfers of property by gift is not a direct tax but an excise.

The decisions of this Court afford no precise definition of a direct tax, but it was early settled that the term includes a capitation tax and a tax upon land. Prior to *Pollock* v. *Farmers' Loan & Trust Co.,* 157 U. S. 429; 158 U. S. 601, it was thought that those were the sole instances of the direct tax referred to in the Constitution. *Brushaber* v. *Union Pacific R. Co.,* 240 U. S. 1. It has now become established that the constitutional rule of apportionment had its origin in the purpose to require that taxes on persons solely because of their general ownership of property should be levied upon the States in proportion to their population, and that there is no sound distinction between a tax levied on a person solely by reason of his general ownership of real property and the same tax imposed solely because of his general ownership

of personal property. It is also settled that a tax on the income derived from either real or personal property is the legal equivalent of a direct tax on the property from which the income is derived. *Pollock* v. *Farmers' Loan & Trust Co., supra; Knowlton* v. *Moore,* 178 U. S. 41.

But the tax in this case is not a direct tax growing out of the general ownership of property, but is a tax upon a particular use of that property. It is not a tax directly upon the existence of the right to use the property, but a tax upon the exercise of that right. *Knowlton* v. *Moore, supra.*

That there is a substantial difference between the passive right and the active exercise of that right is shown by *Billings* v. *United States,* 232 U. S. 261; *Pierce* v. *United States,* 232 U. S. 290.

The following have been sustained as indirect taxes:

Taxes on particular types of sales: *Nicol* v. *Ames,* 173 U. S. 509; *Thomas* v. *United States,* 192 U. S. 363; upon the use of carriages for the conveyance of persons: *Hylton* v. *United States,* 3 Dall. 171; upon the amount of notes paid out by any state bank: *Veazie Bank* v. *Fenno,* 8 Wall. 533; upon manufactured tobacco, having reference to its origin and intended use: *Patton* v. *Brady,* 184 U. S. 608; upon the manufacture and sale of colored oleomargarine: *McCray* v. *United States,* 195 U. S. 27; a succession tax upon the devolution of title to real estate: *Scholey* v. *Rew,* 23 Wall. 331; a tax on legacies: *Knowlton* v. *Moore,* 178 U. S. 41; taxes on doing business by particular methods: *Flint* v. *Stone Tracy Co.,* 220 U. S. 107; *Spreckels Sugar Co.* v. *McClain,* 192 U. S. 397; *Stratton's Independence* v. *Howbert,* 231 U. S. 399; *Doyle* v. *Mitchell Bros. Co.,* 247 U. S. 179; *Stanton* v. *Baltic Mining Co.,* 240 U. S. 103.

See *Keeney* v. *New York,* 222 U. S. 525, and *Nichols* v. *Coolidge,* 274 U. S. 531.

Nor can it be doubted since *Knowlton* v. *Moore, supra,* and *New York Trust Co.* v. *Eisner,* 256 U. S. 345, that a tax may be indirect even though inevitable. Ability to shift the tax from the person upon whom it first falls is not a necessary element. No decision of this Court classifies as direct a tax imposed on a particular use of property. Distinguishing *Dawson* v. *Kentucky Distilleries,* 255 U. S. 288.

A tax upon the transfer of property by gift is not equivalent to a tax upon property because of its ownership. It does not interfere with "the only uses of which it is capable." There are many useful things which one may do with his property besides giving it away.

From the above-cited cases it appears that the use of property is distinguishable from the ownership of property and that indirect taxes may properly be based upon the use. *Nicol* v. *Ames,* 173 U. S. 509; *Billings* v. *United States,* 232 U. S. 261; *Bowman* v. *Continental Oil Co.,* 256 U. S. 642.

After full consideration of the above cases, the gift tax has been sustained in *Blodgett* v. *Holden,* 11 F. (2d) 180; *Anderson* v. *McNeir,* 16 F. (2d) 970. Since this Court held the statute invalid as it was retroactively applied in *Blodgett* v. *Holden,* 275 U. S. 142, it was found unnecessary to answer the certified question dealing with the classification of the tax as direct or indirect. After the decision in that case, *Anderson* v. *McNeir, supra,* was reversed in this Court on confession of error, 275 U. S. 577, with the result that the classification of the tax has not yet been considered by this Court. *O'Connor* v. *Anderson,* 28 F. (2d) 873.

The only distinction between a gift and a devise is that the latter is a statutory, not a common-law privilege. It is difficult to formulate a reason why a tax upon the exercise of the right to make a sale of property differs in principle from a tax upon the exercise of the right to make a

gift of property. Cf. dissenting opinion in *Untermyer* v. *Anderson*, 276 U. S. 440.

The estate tax and the gift tax are *in pari materia* and progressively in execution of the power to raise revenue. This is not to use the power of taxation for an ulterior purpose, as in the *Child Labor Tax Case*, 259 U. S. 20. There can be no doubt that the gift tax was enacted by Congress as a means of making the estate tax effective. By splitting up large fortunes and making absolute gifts *inter vivos*, the estate tax was being avoided (65 Cong. Rec., Pt. 3, pp. 3119, 3120; Pt. 4, pp. 3170, 3172; Pt. 8, pp. 8094, 8097). Adequate provision was made for crediting the gift tax against the estate tax where the amount of the gift was later required to be included in a decedent's gross estate. (Rev. Act of 1924, § 322; and Rev. Act of 1928, § 404.)

The presumption in this case, of course, is in favor of the validity of the statute. And this presumption, repeatedly indulged, is particularly strong when considering a Revenue Act. *Nicol* v. *Ames*, 173 U. S. 509. This statute is an integral part of an entire taxing scheme considered necessary by Congress for satisfying the needs of the Government for revenue. A measure may be valid as a necessary adjunct to something which clearly lies within the legislative power, even though, standing alone, its constitutionality might have been subject to doubt. *Purity Extract Co.* v. *Lynch*, 226 U. S. 192; *Ruppert* v. *Caffey*, 251 U. S. 264; *Everard's Breweries* v. *Day*, 265 U. S. 545; *Taft* v. *Bowers*, 278 U. S. 470.

II. Progressive rates of taxation and proper exemptions violate no constitutional provisions applicable to federal taxation. *Knowlton* v. *Moore*, 178 U. S. 41; *Brushaber* v. *Union Pacific R. Co.*, 240 U. S. 1; *Treat* v. *White*, 181 U. S. 264; *Patton* v. *Brady*, 184 U. S. 608; *Flint* v. *Stone Tracy Co.*, 220 U. S. 107; *Billings* v. *United States*, 232 U. S. 261; *Stanton* v. *Baltic Mining Co.*, 240

U. S. 103; *Tyee Realty Co.* v. *Anderson*, 240 U. S. 115; *High* v. *Coyne*, 178 U. S. 111; *Keeney* v. *New York*, 222 U. S. 525; *Barclay & Co.* v. *Edwards*, 267 U. S. 442; *Schlesinger* v. *Wisconsin*, 270 U. S. 230; *LaBelle Iron Works* v. *United States*, 256 U. S. 377; *Magoun* v. *Illinois Trust Co.*, 170 U. S. 299; *Burk-Waggoner Oil Ass'n* v. *Hopkins*, 269 U. S. 110.

The gift tax was imposed largely to prevent avoidance of the estate tax by gifts *inter vivos* and, accordingly, it was necessary to adjust the rates upon gifts to equalize the rates upon estates. This Congress has done. Compare §§ 301 and 319 of the Revenue Act of 1924. Avoidance of the estate tax could not be adequately prevented unless the gift tax provisions contained the same graduated rates.

The decision of this Court in *United States* v. *Goelet*, 232 U. S. 293, makes it clear that there is a difference in fact between resident and non-resident citizens; and the difference is so substantial that this Court held a tax levied upon "any citizen" can not be treated, without the expression of a more definite intent, as embracing the exceptional exertion of the power to tax one permanently residing abroad.

MR. JUSTICE STONE delivered the opinion of the Court.

In this case, pending in the Court of Appeals for the Third Circuit, that court has certified to this questions of law concerning which it asks instructions for the proper disposition of the cause. Judicial Code, § 239, as amended by Act of February 13, 1925.

Bromley, a resident of the United States, brought the present suit in the District Court for Eastern Pennsylvania, to recover a tax alleged to have been illegally exacted, upon gifts made by him after the effective date of § 319 of the Revenue Act of 1924 (43 Stat. 253, 313,

as amended by § 324 (a) of the Revenue Act of 1926, 44 Stat. 9, 86). This section imposes a graduated tax "upon the transfer by a resident by gift" during the calendar year "of any property wherever situated . . ." In computing the amount of the gift subject to the tax, § 321, in the case of a resident, exempts gifts aggregating $50,000, gifts to any one person which do not exceed $500, and certain gifts for religious, charitable, educational, scientific and like purposes. The questions certified are:

1. Are the provisions of Sections 319–324 of the Revenue Act of 1924, as amended by Section 324 of the Revenue Act of 1926, when applied to transfers of property by gift inter vivos, made after the effective dates of the cited Revenue Acts and not made in contemplation of death, invalid, because they violate (a) the third clause of Section 2 and (b) the fourth clause of Section 9 of Article 1 of the Constitution in that the tax they impose is a direct tax and has not been apportioned?

2. Are the cited provisions, when applied to transfers of property made in like circumstances, invalid because they violate (a) the Fifth Amendment to the Constitution and (b) the first clause of Section 8 of Article 1 of the Constitution in that they impose a tax which is graduated and subject to exemptions and therefore lacks uniformity, and also deprive a person of his property without due process of law?

1. The first question was mooted by counsel, but not decided, in *Blodgett* v. *Holden*, 275 U. S. 142, and *Untermyer* v. *Anderson*, 276 U. S. 440. The general power to "lay and collect taxes, duties, imposts and excises" conferred by Article I, § 8 of the Constitution, and required by that section to be uniform throughout the United States, is limited by § 2 of the same article, which requires "direct" taxes to be apportioned, and § 9, which provides that "no capitation or other direct tax shall be laid unless in proportion to the census" directed by the Constitution

to be taken. As the present tax is not apportioned, it is forbidden if direct.

The meaning of the phrase "direct taxes" and the historical background of the constitutional requirement for their apportionment have been so often and exhaustively considered by this Court, *Hylton* v. *United States,* 3 Dall. 171; *Pollock* v. *Farmers Loan & Trust Company,* 157 U. S. 429, 158 U. S. 601; *Knowlton* v. *Moore,* 178 U. S. 41; *Nicol* v. *Ames,* 173 U. S. 509, 515, that no useful purpose would be served by renewing the discussion here. Whatever may be the precise line which sets off direct taxes from others, we need not now determine. While taxes levied upon or collected from persons because of their general ownership of property may be taken to be direct, *Pollock* v. *Farmers Loan & Trust Company,* 157 U. S. 429, 158 U. S. 601, this Court has consistently held, almost from the foundation of the government, that a tax imposed upon a particular use of property or the exercise of a single power over property incidental to ownership, is an excise which need not be apportioned, and it is enough for present purposes that this tax is of the latter class. *Hylton* v. *United States, supra,* cf. *Veazie Bank* v. *Fenno,* 8 Wall. 533; *Thomas* v. *United States,* 192 U. S. 363, 370; *Billings* v. *United States,* 232 U. S. 261; *Nicol* v. *Ames, supra; Patton* v. *Brady,* 184 U. S. 608; *McCray* v. *United States,* 195 U. S. 27; *Scholey* v. *Rew,* 23 Wall. 331; *Knowlton* v. *Moore, supra;* see also *Flint* v. *Stone Tracy Co.,* 220 U. S. 107; *Spreckels Sugar Refining Co.* v. *McClain,* 192 U. S. 397; *Stratton's Independence* v. *Howbert,* 231 U. S. 399; *Doyle* v. *Mitchell Brothers Co.,* 247 U. S. 179, 183; *Stanton* v. *Baltic Mining Co.,* 240 U. S. 103, 114.

It is a tax laid only upon the exercise of a single one of those powers incident to ownership, the power to give the property owned to another. Under this statute all the other rights and powers which collectively constitute

property or ownership may be fully enjoyed free of the tax. So far as the constitutional power to tax is concerned, it would be difficult to state any intelligible distinction, founded either in reason or upon practical considerations of weight, between a tax upon the exercise of the power to give property *inter vivos* and the disposition of it by legacy, upheld in *Knowlton* v. *Moore, supra,* the succession tax in *Scholey* v. *Rew, supra,* the tax upon the manufacture and sale of colored oleomargarine in *McCray* v. *United States, supra,* the tax upon sales of grain upon an exchange in *Nicol* v. *Ames, supra,* the tax upon sales of shares of stock in *Thomas* v. *United States, supra,* the tax upon the use of foreign built yachts in *Billings* v. *United States, supra,* the tax upon the use of carriages in *Hylton* v. *United States, supra;* compare *Veazie Bank* v. *Fenno, supra,* 545, *Thomas* v. *United States, supra,* 370.

It is true that in each of these cases the tax was imposed upon the exercise of one of the numerous rights of property, but each is clearly distinguishable from a tax which falls upon the owner merely because he is owner, regardless of the use or disposition made of his property. See *Billings* v. *United States, supra;* cf. *Pierce* v. *United States,* 232 U. S. 290. The persistence of this distinction and the justification for it rest upon the historic fact that taxes of this type were not understood to be direct taxes when the Constitution was adopted and, as well, upon the reluctance of this Court to enlarge by construction, limitations upon the sovereign power of taxation by Article I, § 8, so vital to the maintenance of the National Government. *Nicol* v. *Ames, supra,* 514, 515.

It is said that since property is the sum of all the rights and powers incident to ownership, if an unapportioned tax on the exercise of any of them is upheld, the distinction between direct and other classes of taxes may be wiped out, since the property itself may likewise be taxed by resort to the expedient of levying numerous taxes upon its

uses; that one of the uses of property is to keep it, and that a tax upon the possession or keeping of property is no different from a tax on the property itself. Even if we assume that a tax levied upon all the uses to which property may be put, or upon the exercise of a single power indispensable to the enjoyment of all others over it, would be in effect a tax upon property, see *Dawson* v. *Kentucky Distilleries & Warehouse Co.*, 255 U. S. 288, and hence a direct tax requiring apportionment, that is not the case before us.

The power to give cannot be said to be a more important incident of property than the power to use, the exercise of which was taxed in *Billings* v. *United States*, and even though differences in degree may be carried to a point where they produce distinctions in kind, the present levy falls so far short of taxing generally the uses of property that it cannot be likened to the taxes on property itself which have been recognized as direct. It falls, rather, into that category of imposts or excises which, since they apply only to a limited exercise of property rights, have been deemed to be indirect and so valid although not apportioned.

2. The uniformity of taxation throughout the United States enjoined by Article I, § 8, is geographic, not intrinsic. A graduated tax, on legacies, granting exemptions, *Knowlton* v. *Moore, supra,* or on incomes, *Brushaber* v. *Union Pacific R. Co.*, 240 U. S. 1, does not violate this clause of the Constitution, nor are such taxes infringements on the Fifth Amendment. *Knowlton* v. *Moore, supra,* p. 109; *Brushaber* v. *Union Pacific R. Co., supra,* pp. 24, 25. Graduated taxes on inheritances or successions, with provisions for exemptions, have so often been upheld as not violating either the due process or the equal protection clauses of the Fourteenth Amendment, *Stebbins* v. *Riley,* 268 U. S. 137, as to leave little ground for supposing that taxation by Congress embracing these

features, and otherwise valid, could be deemed a denial of the due process clause of the Fifth. See *Van Oster* v. *Kansas,* 272 U. S. 465, 468.

It is suggested that the schemes of graduation and exemption in the present statute, by which the tax levied upon donors of the same total amounts may be affected by the size of the gifts to individual donees, are so arbitrary and unreasonable as to deprive the taxpayer of property without due process. But similar features of state death taxes have been held not to infringe the Fourteenth Amendment since they bear such a relation to the subject of the tax as not "to preclude the assumption that the legislature, in enacting the statute, did not act arbitrarily or without the exercise of judgment and discretion which rightfully belong to it." *Stebbins* v. *Riley, supra,* p. 145. No more can they be a basis for holding that the graduation and exemption features of the present statute violate the Fifth Amendment.

The answer to both questions is, No.

Opinion of MR. JUSTICE SUTHERLAND, dissenting, delivered by MR. JUSTICE BUTLER.

In the convention which framed the Constitution, Mr. King on one occasion asked what was the precise meaning of "direct taxation," and Mr. Madison informs us that no one answered. That Mr. Madison took the pains to record the incident indicates that it challenged attention but that no one was able to formulate a definition. And though we understand generally what is a direct tax and what taxes have been declared to be direct, we are still as incapable of formulating an exact definition as were those who wrote the taxation clauses into the Constitution. Since the *Pollock* case, however, we know that a tax on property, whether real or personal, or upon the income derived therefrom, is direct; and that to levy a tax by reason of ownership of property is to

tax the property. *Dawson* v. *Kentucky Distilleries Co.*, 255 U. S. 288, 294.

The right to give away one's property is as fundamental as the right to sell it or, indeed, to possess it. To give away property is not to exercise a separate element or incident of ownership, like the use of a carriage, but completely to sever the donor's relation to the property and leave in him no element or incident of ownership whatsoever. Reasonably it cannot be doubted that the power to dispose of property according to the will of the owner is a property right. If a tax upon the sale of property, irrespective of special circumstances, is a direct tax, it is clear that a tax upon the gift of property, irrespective of special circumstances, is, likewise, direct. In my opinion, both are direct because they are in substance and effect not excise taxes but taxes upon property. By repeated decisions of this Court it has become axiomatic that it is the substance and not the form that controls in such matters.

Brown v. *Maryland*, 12 Wheat. 419, involved the validity of a state statute which exacted a license fee of $50 of importers of foreign goods and other persons selling the same by wholesale, bale or package, etc. The act was held void as imposing a duty on imports. It was argued that the tax was not upon the article but upon the person; that the state had the power to tax occupations, and this was nothing more. To this Chief Justice Marshall replied (p. 444) in words that have been repeatedly approved in subsequent decisions of this Court:

"It is impossible to conceal from ourselves, that this is varying the form, without varying the substance. It is treating a prohibition, which is general, as if it were confined to a particular mode of doing the forbidden thing. All must perceive, that a tax on the sale of an article, imported only for sale, is a tax on the article itself."

In *Cook* v. *Pennsylvania,* 97 U. S. 566, it was held that a tax on the amount of sales made by an auctioneer was a tax upon the goods sold, and where these goods were imported in the original package and sold for the importer the law authorizing the tax was void.

Nicol v. *Ames,* 173 U. S. 509, is not to the contrary of these cases, but in complete accord with them. There it was held that a tax levied upon a sale of property effected at a board of trade or exchange was an excise laid upon the privilege, opportunity or facility afforded by boards of trade or exchanges for the transaction of the business and not upon the property *or the sale thereof,* which, it was conceded, would be a direct tax and void without apportionment. Brief quotations from the opinion will make the distinction clear. Referring to the cases which had been cited against the tax, including *Brown* v. *Maryland, supra,* and the *Pollock* case, it was said that all these cases involved the question whether the taxes assailed were in effect taxes upon property and (p. 519): "If this tax is not on the property *or on the sale thereof,* then these cases do not apply." At p. 520, answering the contention that the tax was one on the property sold, it was said: "It is not laid upon the property at all, nor upon the profits of the sale thereof, nor upon the sale itself considered separate and apart from the place and the circumstances of the sale." And finally at p. 521, the Court said in words that admit of no mistake: "A tax upon the privilege of selling property at the exchange and of thus using the facilities there offered in accomplishing the sale differs radically from a tax upon every sale made in any place. *The latter tax is really and practically upon property.* It takes no notice of any kind of privilege or facility, and the fact of a sale is alone regarded."

To me it seems plain that a tax imposed upon an ordinary gift, to be measured by the value of the property

given and without regard to any qualifying circumstances, is a tax by indirection upon the property, as much, for example, as a tax upon the mere possession by the owner of a farm, measured by the value of the land possessed, would be a tax on the land. To call either of them an excise is to sacrifice substance to a mere form of words. I think, therefore, the first question certified, without stopping to consider the second, should be answered in the affirmative.

MR. JUSTICE VAN DEVANTER and MR. JUSTICE BUTLER concur in this opinion.

EX PARTE NORTHERN PACIFIC RAILWAY COMPANY ET AL.

ON PETITION FOR A WRIT OF MANDAMUS.

No. 21, Original. Return to rule presented November 25, 1929.—Decided December 2, 1929.

In a suit in the District Court to restrain state officers, by interlocutory and permanent injunctions, from enforcing an order affecting railway rates upon the ground that the order conflicts with the Federal Constitution and laws, when the plaintiffs apply for an interlocutory injunction on that ground and the district judge grants a temporary restraining order to be effective until such application shall be determined, it is his duty under Jud. Code, § 266, U. S. C. Title 28, § 380, immediately to call two other judges, one of whom shall be a circuit justice or a circuit judge, to assist him in hearing and determining such application, and neither he, nor another district judge, in the presence of such application and when it is being pressed, has jurisdiction, sitting alone, to entertain a motion by the defense to dissolve the temporary restraining order or a motion by the defense to dismiss the bill, or jurisdiction to dismiss the bill on the merits. P. 144.

PETITIONS for a rule directing the Honorable George M. Bourquin and the Honorable Charles N. Pray, judges of the District Court for the District of Montana, and the

District Court for that District, to show cause why a writ of mandamus should not issue to set aside a decree dismissing the petitioners' bill of complaint, and further directing Judge Pray to call in two other judges to assist him to hear and determine petitioners' application for an interlocutory injunction. The case was heard on the original and supplemental petitions and the return to a rule to show cause issued to the two judges. The rule is made absolute.

Messrs. Bruce Scott, H. H. Field, F. G. Dorety, M. S. Gunn, and *Dennis F. Lyons* were on the brief for petitioners.

Messrs. L. A. Foot, Attorney General of Montana, and *Francis A. Silver* were on the brief for respondents.

Per Curiam: This is a petition for a writ of mandamus. A rule to show cause was issued and a return has now been made to the rule. From the petition and the return the facts are shown to be as follows: The Northern Pacific Railway Company and three others brought a suit in the District Court for the District of Montana against the Board of Railroad Commissioners of that State and others to prevent the enforcement of a rate order made by the board, the objection urged against the order being that it was in conflict with the commerce clause of the Constitution of the United States and with certain provisions of the commerce laws of Congress. The plaintiffs applied for a temporary restraining order and for an interlocutory injunction. District Judge Pray granted a temporary restraining order which was to continue in force " until the plaintiffs' application for an interlocutory injunction be heard and determined by three judges as provided by statute." Afterwards, but before three judges were assembled to hear the application for an in-

terlocutory injunction, District Judge Bourquin, sitting alone, entertained a motion by the defendants to dissolve the temporary restraining order, and also a motion to dismiss the bill on the merits. The plaintiffs objected that a single judge was without authority to entertain or act upon either motion, but Judge Bourquin overruled the objection, sustained the motion to dismiss and entered a final decree of dismissal. Of course, the decree, if valid, operated not only as a revocation of the temporary restraining order but also as a denial of the application for an interlocutory injunction.

Manifestly the suit was within the terms and spirit of § 380, Title 28, of the United States Code. When Judge Pray granted a temporary restraining order to be effective until the application for an interlocutory injunction should be heard and determined, it became his duty under that section immediately to call two other judges, one of whom should be either a circuit justice or a circuit judge, to assist him in hearing and determining the application for an interlocutory injunction. Not only so, but the section as amended by the Act of February 13, 1925, c. 29, 43 Stat. 938, extends the requirement respecting the presence of three judges to the final hearing in such a suit. Under our decisions construing and applying the section, Judge Bourquin sitting alone was without jurisdiction to hear either the motion to dissolve the temporary restraining order or the motion to dismiss the bill on the merits. In the presence of the application for an interlocutory injunction—which was at no time withdrawn but constantly pressed—a single judge, whether Judge Pray or Judge Bourquin, was as much without authority to dismiss the bill on the merits as he would be to grant either an interlocutory or a permanent injunction. Our decisions leave no doubt on these points. *Ex parte Metropolitan Water Company of West Virginia*, 220 U. S. 539; *Cumberland Telephone & Telegraph Com-*

pany v. *Louisiana Public Service Commission*, 260 U. S. 212, 216–217; *Virginian Railway Company* v. *United States*, 272 U. S. 658, 671-673; *Ex parte Atlantic Coast Line R. Co.*, 279 U. S. 822.

It follows that the rule against the respondents must be made absolute with directions to them to vacate the decree of dismissal entered by Judge Bourquin and to take immediate steps for assembling a court of three judges to hear and determine the application for an interlocutory injunction conformably to § 380. We assume it will not be necessary to issue a formal writ.

Rule made absolute.

RAILROAD COMMISSION OF CALIFORNIA ET AL. *v.* LOS ANGELES RAILWAY CORPORATION.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

No. 60. Argued October 22, 1929.—Decided December 2, 1929.

1. A State may authorize a municipal corporation by agreement to establish public service rates and thereby to suspend for a term of years not grossly excessive the exertion of governmental power by legislative action to fix just compensation to be paid for service furnished by public utilities. P. 151.
2. To determine whether such authority has been given in the case before it, this Court, in the absence of decisions of the state courts, must construe the state laws. P. 152.
3. As it is in the public interest that all doubts be resolved in favor of the right of the State from time to time to prescribe rates, a grant of authority to surrender the power is not to be inferred in the absence of a plain expression of purpose to that end. *Id.*
4. The following laws of California are considered and *held* not to have authorized the City of Los Angeles to fix the rates of street car companies by contract:

   (1) Civil Code, § 470 (Mar. 21, 1872,) merely regulating procedure; *id.* § 497 (Stats. 1891, p. 12,) authorizing political subdivisions to grant authority for the laying of railroads in streets "under such restrictions and limitations" as they may provide;

id. § 501 (Stats. 1903, p. 172,) providing that the rate of fare in municipalities of the first class "must not exceed five cents." P. 153.

(2) The Broughton Franchise Act (Stats. 1893, p. 288,) as amended, providing that franchises "shall be granted upon the conditions in this Act provided and not otherwise," and requiring the sale of such franchises upon advertisement stating the character of the franchise or privilege proposed to be granted, but nowhere expressly empowering the city to establish rates by contract; and the amendment thereof, June 8, 1915 (Stats. 1915, p. 1300,) which authorizes grantors of such franchises to impose such additional terms and conditions whether "governmental or contractual in character" as in their judgment are in the public interest. P. 154.

(3) Provisions of the charter of the City of Los Angeles, viz., Art. I, § 2 (25), Stats. 1905, p. 994, forbidding the granting of franchises for use of public streets except by a specified vote and for a term not to exceed 21 years and providing that "Every grant . . . shall make adequate provision by way of forfeiture . . . or otherwise to secure efficiency of public service at reasonable rates and the maintenance of the property in good order throughout the term of the grant"; Art. I, § 2 (30), Stats. 1911, p. 2063, empowering the city to fix "rates . . . for . . . the conveyance of passengers . . . by means of street railway cars," and "To regulate, subject to the provisions of the constitution of the State . . . the construction and operation of . . . street railways . . ."; Art. I, § 2 (40), Stats. 1913, p. 1633, empowering the city to grant franchises for furnishing transportation and to prescribe the terms and conditions of such grants and to prescribe the procedure for making them. P. 155.

5. A State has power, upon the application of a street railway company, to terminate rates of fare fixed by contract between the company and a municipal corporation of the State. P. 156.

6. Under Art. XII, § 23, of the California Constitution, as amended November 3, 1914, and the Public Utilities Act of April 23, 1915, the Railroad Commission has exclusive authority to regulate rates. A five cent street railway fare, even if established by franchise contract, may be increased with the approval of the Commission, and not otherwise, and it is the duty of the Commission, upon finding that the rate is unjust or insufficient, to determine the just and reasonable rate thereafter to be observed. P. 157.

7. The Railroad Commission, upon successive applications of a street railway company in Los Angeles for increased fares at first

found the existing fares insufficient and permitted a small increase, which the company declined, and later found the existing fares sufficient, thus in legal effect requiring the company to observe them. *Held* that, assuming the existing fares had been established by franchise contracts, these exercises of jurisdiction by the Commission abrogated the contracts. Pp. 156–158.

29 F. (2d) 140, affirmed.

APPEAL from a decree of the District Court (three judges) permanently enjoining the Railroad Commission from enforcing street railway fares found to be confiscatory. The City of Los Angeles was a party by intervention.

Mr. Arthur T. George, with whom *Messrs. Ira H. Rowell* and *Roderick B. Cassidy* were on the brief, for the Railroad Commission of California.

Appellee's franchises are contracts.

Where a valid contract fixing rates has been entered into between a city and a public utility, there is no confiscation.

The contracts were binding as between the parties until the Commission exercised the power delegated to it by the legislature by increasing the contract rate in the manner provided by the Public Utilities Act. *Southern Utilities Co.* v. *Palatka,* 268 U. S. 232; *Opelika* v. *Opelika Sewer Co.,* 265 U. S. 215; *Henderson Water Co.* v. *Corporation Comm'n,* 269 U. S. 278; *Manitowoc* v. *Manitowoc & N. T. Co.,* 145 Wis. 13; *Monroe* v. *Detroit M. & T. S. R. Co.,* 187 Mich. 364; *Salt Lake City* v. *Utah L. & T. Co.,* 52 Utah 476; *Traverse City* v. *Railroad Comm'n,* 202 Mich. 575; *Washington* v. *Pacific T. & T. Co.,* 1 F. (2d) 327; *State ex rel. Ellertsen* v. *Home T. & T. Co.,* 102 Wash. 196; *Sumpter G. & P. Co.* v. *Sumpter,* 283 Fed. 931; *Woodburn* v. *Service Comm'n,* 82 Ore. 114; *Southern Pacific Co.* v. *Spring Valley Water Co.,* 173 Cal. 291; *Henrici* v. *South Feather Land Co.,* 177 Cal. 442.

The Commission's orders of 1921 and 1928 did not abrogate the rates fixed in the various franchise contracts.

Rates may be changed only by strict compliance with the applicable statutory procedure. *Wichita R. & L. Co.* v. *Utilities Comm'n*, 260 U. S. 48; *Traverse City* v. *Citizens Tel. Co.*, 195 Mich. 374. Distinguishing *Denney* v. *Pacific T. & T. Co.*, 276 U. S. 97.

Mr. Frederick von Schrader, Deputy City Attorney, with whom *Messrs. Erwin P. Werner*, City Attorney, and *Joseph T. Watson*, Deputy City Attorney, were on the brief, for the City of Los Angeles.

The franchises in question are contracts. *Title Guaranty Co.* v. *Railroad Comm'n*, 168 Cal. 295; *St. Cloud Service Co.* v. *St. Cloud*, 265 U. S. 352; *Madera Water Works* v. *Madera*, 185 Fed. 281; *San Diego* v. *Kerchoff*, 49 Cal. App. 473; *Albany* v. *U. S. F. & G. Co.*, 38 Cal. App. 466; *St. Helena* v. *San Francisco R. Co.*, 24 Cal. App. 71; *Los Angeles R. Co.* v. *Los Angeles*, 152 Cal. 242.

The city had power to enter into such contracts, including the fixing of maximum charges. *Columbus R. Co.* v. *Columbus*, 249 U. S. 399; *Opelika* v. *Opelika Sewer Co.*, 265 U. S. 215; *St. Cloud Service Co.* v. *St. Cloud*, 265 U. S. 352; *Water L. & P. Co.* v. *Hot Springs*, 274 Fed. 827.

It is immaterial that a rate for public service fixed by valid contract between a municipal corporation and a public service corporation may be confiscatory. *St. Cloud Service Co.* v. *St. Cloud*, 265 U. S. 352; *Columbus R. Co.* v. *Columbus*, 249 U. S. 399; *Cleveland* v. *Cleveland City R. Co.*, 194 U. S. 517; *Detroit* v. *Detroit R. Co.*, 184 U. S. 368; *Henderson Water Co.* v. *Corporation Comm'n*, 269 U. S. 278.

The public utility can seek no relief from the courts unless it secures a change of the franchise rates by order of the state railroad commission. There was no change from the contract or franchise rate to a statutory or legis-

lative rate due to the orders of the railroad commission. *Henderson Water Co.* v. *Corporation Comm'n,* 269 U. S. 278; *Milwaukee Electric R. Co.* v. *Railroad Comm'n,* 238 U. S. 174; *Manitowoc* v. *Manitowoc & N. T. Co.,* 145 Wis. 13; *Lenawee County Gas Co.* v. *Adrian,* 209 Mich. 52; *Southern Utilities Co.* v. *Palatka,* 268 U. S. 232; *Pacific T. & T. Co.* v. *Whitcomb,* 12 F. (2d) 279; *Monroe* v. *Detroit M. & T. S. R. Co.,* 187 Mich. 364; *Henrici* v. *South Feather Land Co.,* 177 Cal. 442; *Southern Pacific Co.* v. *Spring Valley Water Co.,* 173 Cal. 291; *Salt Lake City* v. *Utah L. & T. Co.,* 52 Utah 210; *Travers City* v. *Railroad Comm'n,* 202 Mich. 575.

In the absence of California decisions upholding the power to contract, this Court may find that such power did in fact exist. *Milwaukee Electric R. Co.* v. *Railroad Comm'n,* 238 U. S. 174.

Mr. Woodward M. Taylor, with whom *Messrs. S. M. Haskins, Paul R. Watkins,* and *Herbert F. Sturdy* were on the brief, for appellee.

The city has never possessed the power to fix public utility rates by contract.

Under the state constitution the legislature cannot fix public utility rates by contract nor delegate power to the city to do so.

In California, the grant of a franchise is a legislative function and where, as here, no grant of authority to fix rates by contract exists, franchise fare provisions cannot operate by way of condition or estoppel. *South Pasadena* v. *Terminal R. Co.,* 109 Cal. 315.

The fare provisions of these franchises evince an intention to regulate, not to contract.

The Commission has twice exercised jurisdiction over the company's franchise fare. Even assuming the franchise fare provisions constitute contract obligations, the Commission, by its decision in 1921, abrogated that obli-

gation by finding the 5¢ fare inadequate and authorizing a 6¢ fare; and, there being no power in the city to contract as to public utility rates, the 5¢ fare was not a contract obligation and consequently the Commission, by its decision in 1928, had exercised its complete jurisdiction over the fare and, by denying any increase, had deprived the company of its rights under the Federal Constitution. Cf. *Denney* v. *Pacific T. & T. Co.*, 276 U. S. 97.

MR. JUSTICE BUTLER delivered the opinion of the Court.

Appellee operates a street railway system and motor buses for the transportation of passengers in the city of Los Angeles and in other parts of the county of Los Angeles. Its cars are operated on tracks laid in the streets under authority of 102 franchises granted from time to time since 1886. A few were obtained from the county; the others were granted by the city.

Seventy-three granted between November 28, 1890, and October 21, 1918, covering 113.41 miles, provide that "the rate of fare . . . shall not exceed five cents."

Eighteen granted between March 2, 1920, and January 21, 1928, covering 12.33 miles, provide that "the rate of fare . . . shall not be more than five cents . . . except upon a showing before a competent authority having jurisdiction over rates of fare that such greater charge is justified."

The remaining eleven, covering 10.5 miles, were granted at various times from 1886 to 1923; none of them provides that the fare shall not exceed five cents; but it may be assumed that under the provisions of the other ordinances a fare of five cents was made applicable over all lines. Prior to the decree in this case the basic fare charged was five cents.

Maintaining that its existing rates were not sufficient to yield a reasonable return, the company, November 16, 1926, applied to the commission for authority to increase

the basic fare to seven cents in cash or six and one-fourth cents in tokens to be furnished by the company, four for twenty-five cents. The commission, March 26, 1928, made a report and by an order denied the application. A petition for rehearing was denied.

June 22, 1928, the company brought this suit to have the rates and order adjudged confiscatory and for temporary and permanent injunctions restraining the commission from enforcing them. The city intervened as party defendant. The case came on for hearing before three judges on an application for temporary injunction. U. S. C., Tit. 28, § 380. Affidavits were submitted, a transcript of all the evidence before the commission was received and the parties stipulated that thereon the case should be finally determined on the merits. The court found that the rates will not permit the company to earn a reasonable return and are confiscatory; and by its decree permanently enjoined the commission from enforcing them.

The sole controversy is whether the company is bound by contract with the city to continue to serve for the fares specified in the franchises—it being conceded that the finding below respecting the inadequacy of the five cent fare is sustained by the evidence. Appellants contend that at all times the city had power to establish rates by agreement and that the franchise provisions constitute binding contracts that are still in force. On the other hand the company maintains that the State never so empowered the city; and it insists that, if the power was given and any such contracts were made, they have been abrogated.

1. It is possible for a State to authorize a municipal corporation by agreement to establish public service rates and thereby to suspend for a term of years not grossly excessive the exertion of governmental power by legislative action to fix just compensation to be paid for service

furnished by public utilities. *Detroit* v. *Detroit Citizens' R. Co.*, 184 U. S. 368, 382. *Vicksburg* v. *Vicksburg Water Works Co.*, 206 U. S. 496, 508, 515. *Public Service Co.* v. *St. Cloud*, 265 U. S. 352, 355. And where a city, empowered by the State so to do, makes a contract with a public utility fixing the amounts to be paid for its service, the latter may not be required to serve for less even if the specified rates are unreasonably high. *Detroit* v. *Detroit Citizens' R. Co., supra*, 389. And, in such case, the courts may not relieve the utility from its obligation to serve at the agreed rates however inadequate they may prove to be. *Public Service Co.* v. *St. Cloud, supra.*

This court is bound by the decisions of the highest courts of the States as to the powers of their municipalities. *Georgia Ry. Co.* v. *Decatur*, 262 U. S. 432, 438. Our attention has not been called to any California decision, and we think there is none, which decides that the state legislature has empowered Los Angeles to establish rates by contract. This Court is therefore required to construe the state laws on which appellants rely. As it is in the public interest that all doubts be resolved in favor of the right of the State from time to time to prescribe rates, a grant of authority to surrender the power is not to be inferred in the absence of a plain expression of purpose to that end. The delegation of authority to give up or suspend the power of rate regulation will not be found more readily than would an intention on the part of the State to authorize the bargaining away of its power to tax. *Providence Bank* v. *Billings*, 4 Pet. 514, 561. *Railroad Commission Cases*, 116 U. S. 307, 325. *Freeport Water Co.* v. *Freeport*, 180 U. S. 587, 599. *Stanislaus County* v. *San Joaquin C. & I. Co.*, 192 U. S. 201, 210. *Puget Sound Traction Co.* v. *Reynolds*, 244 U. S. 574, 579.

This court applied the established rule in *Home Telephone Co.* v. *Los Angeles*, 211 U. S. 265. That com-

pany's franchise was granted under the Broughton Franchise Act, which provided that every such franchise "shall be granted upon the conditions in this act provided and not otherwise." The city charter gave power to its council to fix charges for telephone service. The franchise stated that the rates should not exceed specified amounts. An ordinance prescribing lower rates was passed. The company brought suit for injunction against its enforcement on the ground that the ordinance violated the contract clause of the Constitution of the United States. The city insisted that it had not been empowered by the State to make such a contract, and this court upheld its contention. It said (p. 273): "The surrender, by contract, of a power of government, though in certain well-defined cases it may be made by legislative authority, is a very grave act, and the surrender itself, as well as the authority to make it, must be closely scrutinized. . . . The general powers of a municipality or of any other political subdivision of the State are not sufficient. Specific authority for that purpose is required." And, dealing with the charter provision there relied on by the company, the court said (p. 274): "The charter gave to the council the power 'by ordinance . . . to regulate telephone service and the use of telephones within the city, . . . and to fix and determine the charges for telephones and telephone service and connections.' This is an ample authority to exercise the governmental power . . . but entirely unfitted to describe the authority to contract. It authorizes command, but not agreement."

Section 470 of the Civil Code (March 21, 1872) cited by appellants merely regulates procedure. Section 497 authorizes political subdivisions to grant authority for the laying of railroads in streets "under such restrictions and limitations" as they may provide. Stats. 1891, p. 12. This is too general. The clause in § 501 (Stats. 1903, p. 172) providing that the rate of fare in municipalities

of the first class "must not exceed five cents" does not relate to the power to contract, and plainly has no application here because Los Angeles never belonged to that class.

Section 1 of the Broughton Franchise Act [1] provides that franchises "shall be granted upon the conditions in this Act provided and not otherwise." The Act requires the sale of such franchises upon advertisement stating the character of the franchise or privilege proposed to be granted, but it nowhere expressly empowers the city to establish rates by contract. This court in the *Home Telephone Company* case dealt with the quoted provision. It said (p. 275): "Here is an emphatic caution against reading into the act any conditions which are not clearly expressed in the act itself. . . . It cannot be supposed that the legislature intended that so significant and important an authority as that of contracting away a power of regulation conferred by the charter should be inferred from the act in the absence of a grant in express words. But there is no such grant." And, so far as concerns the matter under consideration, the Act was not expanded by the amendment of June 8, 1915. It authorizes grantors of such franchises to impose such additional terms and con-

[1] Its first sentence, as originally enacted, read: "Every franchise or privilege to . . . construct or operate railroads along or upon any public street or highway, or to exercise any other privilege whatever hereafter proposed to be granted by the . . . governing or legislative body of any . . . city . . . shall be granted upon the conditions in this Act provided, and not otherwise." Stats. 1893, p. 288. The Act was amended in 1897 (Stats. 1897, pp. 135, 177); re-enacted in 1901 (Stats. 1901, p. 265) and 1905 (Stats. 1905, p. 777) and amended in 1909. Stats. 1909, p. 125. The first sentence has remained substantially the same. The amendment of June 8, 1915 (Stats. 1915, p. 1300) inserted immediately after this sentence: "The grantor may, however, in such franchise impose such other and additional terms and conditions not in conflict herewith, whether governmental or contractual in character, as in the judgment of the legislative body thereof are to the public interest."

ditions "whether governmental or contractual in character" as in their judgment are in the public interest. This general language does not measure up to the rule earlier invoked here by Los Angeles and applied by this court in the *Home Telephone Company* case.

The appellants invoke provisions of the city charter which are printed in the margin.[2] But it requires no discussion to show that they are not sufficient to empower the city by contract to establish rates. In support of their claim, they cite *Columbus R. & P. Co.* v. *Columbus*, 249 U. S. 399; *Opelika* v. *Opelika Sewer Co.*, 265 U. S. 215; *Public Service Co.* v. *St. Cloud*, *supra*, and *Southern Utilities Co.* v. *Palatka*, 268 U. S. 232. But the *Columbus* case did not involve, and this Court did not there decide, the question of power. See p. 407 and 194 U. S. at pp. 532, 534. And in the other cases, we followed the decisions of the courts of the respective States.

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[2]Art. I, § 2(25) (February 16, 1905) Stats. 1905, p. 994, providing that no franchise for use of public streets should be granted by the city except by a specified vote nor for a term of more than 21 years and that "Every grant . . . shall make adequate provision by way of forfeiture . . . or otherwise to secure efficiency of public service at reasonable rates and the maintenance of the property in good order throughout the term of the grant."

Art. I, § 2(30) (March 25, 1911) Stats. 1911, p. 2063: "The city . . . shall have the right and power: . . . to fix and determine the rates . . . for . . . the conveyance of passengers . . . by means of street railway cars. . . . To regulate, subject to the provisions of the constitution of the State of California, the construction and operation of . . . street railways. . . ."

Art. I, § 2(40), being § 2(25), *supra*, (as amended April 7, 1913) Stats. 1913, p. 1633: "The city . . . shall have the right and power: To grant franchises, . . . for furnishing . . . transportation . . . or any other public service; to prescribe the terms and conditions of any such grant, and to prescribe by ordinance . . . the method of procedure for making such grants; . . ."

Appellants have failed to sustain their contention that the city was empowered to make such rate contracts.

2. But assuming that the fares were established by the franchise contracts we are of opinion that such contracts have been abrogated. The State had power upon the company's application, through its commission or otherwise, to terminate them. *Pawhuska* v. *Pawhuska Oil & Gas Co.*, 250 U. S. 394. *Trenton* v. *New Jersey*, 262 U. S. 182, 186. *Henderson Water Co.* v. *Corporation Commission*, 269 U. S. 278. *Denney* v. *Pacific Tel. Co.*, 276 U. S. 97.

November 30, 1918, the company applied to have the commission investigate its service and financial condition and for an order authorizing it to "so operate its system and change its rates that the income will be sufficient to pay the costs of the service." May 31, 1921, the commission found that the existing fares would not permit the company to collect enough to enable it to provide adequate service. See P. U. R. 1922A, 66, 90. And it made an order permitting a small increase. The company did not accept it, but applied for a rehearing. After several postponements the case was stricken from the calendar, and some years later the company asked that its application be dismissed. The commission, October 18, 1926, granted the company's request and also revoked the order.

Shortly thereafter the company applied for a basic fare of seven cents in cash or six and one-quarter cents in tokens. The fares so proposed were substantially higher than those which were not accepted by the company. Again the commission made extensive investigations. And March 26, 1928, it filed a report which contained findings as to the value of the property, operating revenues, operating expenses including cost of depreciation and taxes, amount available for return, average net income for five years ending with 1926, stated that the cost of operation might be reduced, and concluded that by reason of such facts the rates of fare charged by the com-

pany were not unreasonable and that the rates proposed would be unjust and unreasonable. And the commission made an order denying the company's application.

There is no decision in the courts of the State as to the effect of the proceedings before and action taken by the commission, and therefore we are required to construe the applicable provisions of the local constitution and statutes. *Denney* v. *Pacific Tel. Co., supra,* 101. Under the state constitution, Art. XII, § 23, as amended November 3, 1914, and the Public Utilities Act of April 23, 1915, the commission has exclusive power to regulate rates. And § 27 of the Act [3] gave to street railway companies the right to charge more than five cents upon showing before the commission that the higher charge is justified. No distinction is made between rates established by franchise contracts and those otherwise fixed. Fares may not be changed without approval of the commission. The policy of the State is that all rates shall be just and reasonable (§ 15) and the commission is directed, whenever after hearing had upon its own motion or upon complaint it shall find that rates are unjust or insufficient, to determine the just and reasonable rates thereafter to be observed. § 32(a).[4] The language used

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[3] Section 27 declares that fares of more than five cents shall not be charged on street railroads "except upon a showing before the commission that such greater charge is justified; provided, that until the decision of the commission upon such showing, a street . . . railroad . . . may continue to . . . receive the fare lawfully in effect on November 3, 1914. Stats. 1915, p. 131.

[4] Section 32 (a): "Whenever the commission, after a hearing had upon its own motion or upon complaint, shall find that the rates . . . collected by any public utility . . . are unjust, unreasonable, discriminatory or preferential, or in anywise in violation of any provision of law or that such rates . . . are insufficient, the commission shall determine the just, reasonable or sufficient rates . . . to be thereafter observed and in force, and shall fix the same by order as hereinafter provided." Stats. 1915, p. 132.

in *Denney* v. *Pacific Tel. Co., supra,* p. 102, is pertinent here. "The Department made its investigation and order without regard to the franchise rates and treated the questions presented as unaffected thereby. It exercised the power and duty to fix reasonable and compensatory rates irrespective of any previous municipal action. We must treat the result as a bona fide effort to comply with the local statute."

The proceedings before the commission and its orders clearly show that it twice took jurisdiction to determine just and reasonable rates. Its order of May 31, 1921, by reason of the company's failure to put in the increased rates never became operative and finally was vacated. The report and order of March 26, 1928, found that existing rates were just and reasonable and in legal effect required the company to continue to observe them. The court below found the rates confiscatory, and appellants do not here question that finding.

Decree affirmed.

MR. JUSTICE MCREYNOLDS is of opinion that, as our finding that the city had no power to make rate contracts is sufficient to dispose of the case, it would be better not to take up the second point.

MR. JUSTICE BRANDEIS, dissenting.

The Railway claims that the Commission's refusal to authorize a fare higher than five cents confiscates its property. The City and the Commission do not insist here that the five-cent fare is compensatory; and they concede that, since 1915, the latter has had jurisdiction to authorize a higher fare. They defend solely on the ground that the Railway bound itself by contracts not to charge more; that these contract provisions are still in force, except as modified by the Act of 1915 empowering the Commission to authorize changes in the rate;

that an alleged error of the Commission in refusing authority to charge more can be corrected only by proceedings brought in the Supreme Court of the State to compel the Commission to do its duty; and that the lower court's finding that the rate is non-compensatory is, therefore, immaterial.

The District Court recognized that such contracts, if existing, would be a complete defense to this suit, *Columbus Ry. & Power Co.* v. *Columbus,* 249 U. S. 399; *Georgia Ry. & Power Co.* v. *Decatur,* 262 U. S. 432; *Opelika* v. *Opelika Sewer Co.,* 265 U. S. 215; *St. Cloud Public Service Co.* v. *St. Cloud,* 265 U. S. 352; *Southern Utilities Co.* v. *Palatka,* 268 U. S. 232; expressed a strong doubt whether the City ever had the power to contract concerning the rate of fare; and, declining to pass upon that question, granted the relief prayed for solely on the ground that any such contract right which existed had been abrogated.

The franchises under which the Railway is operating are confessedly contracts. The words used concerning the rate of fare are apt ones to express contractual obligations. The Railway contends, however, that the fare provisions were not intended to be contracts, and that, if they were so intended, they were not binding, because neither the City nor the County had the power to contract as to the rate of fare. It insists further that if the fare provisions were originally binding as contracts, they were abrogated in 1921 or 1928 by action of the Commission.

First. Most of the franchises were granted before the State had vested in the Commission power to regulate street railway rates or had expressly reserved to itself, otherwise, the power to change rates theretofore fixed by ordinance. This power of regulation was first expressly conferred upon the Commission in 1915, by amendments to §§ 13, 27 and 63 of the Public Utilities Act, Stats. 1915,

p. 115, made pursuant to an amendment of § 23 of Article XII of the California Constitution adopted November 3, 1914. These enactments did not purport to abrogate any existing contract. Nor did they purport to take from the City or from the County any power theretofore possessed to make a contract concerning the rate of fare. Their effect was merely to make any such contract, whether theretofore or thereafter entered into, subject to change by the Commission. Unless and until so changed a contractual fare fixed by franchise remains in full force. *Henderson Water Co.* v. *Corp. Comm.*, 269 U. S. 278, 281–2. Consequently, it is not here claimed that these enactments alone abrogated the alleged contracts as to rate of fare.

Second. The Railway contends, however, that the Commission abrogated the fare contracts by its action taken in 1921 pursuant to this legislation. The facts are these. In 1918, the Railway asked the Commission to make an investigation of its service and its financial condition and for an order enabling it to so operate its system that the income would be sufficient to pay the cost of the service. In that application the Railway expressly disclaimed any desire to increase its rate of fare, but about two years later, it made a supplemental application for leave to do so. On May 31, 1921, the Commission made a report in which it declared that "an increase in the fare in some form" should be granted; and that the Railway be authorized "to file with the Commission and put into effect within thirty (30) days from the date of this order a schedule of rates increasing the present basic 5-cent fare to 6 cents," ten tickets for 50 cents. 19 Cal. R. R. Comm. Op. 980, 1002. The Railway did not file a schedule of fares. Instead, it moved for a rehearing. That motion was promptly set down for hearing by the Commission, but was never heard. For the Railway asked first for an adjournment; then that its motion be stricken

from the calendar; and finally, that an order be entered setting aside the decision made and dismissing the entire proceeding, including the application for increase of fare. This request of the Railway was granted, the order of dismissal reciting that the authorization to increase the fare had "been suspended by virtue of the pendency of a petition for rehearing," as the statutes provided. Public Utility Act, § 66. Obviously this action taken in 1921 cannot be deemed an abrogation or modification of any existing fare provision of the franchises, unless it be held that mere entry by the Commission upon an enquiry as to the rate of fare, as commanded by the statute, has that effect. Reason and authority are to the contrary.

Third. Nor did the action taken by the Commission in 1928, in the proceedings now under review, abrogate any existing fare provision. There also the Commission took jurisdiction, as it was by the statute required to do. It refused to authorize a higher fare, because it concluded that for the past five years the Railway had been earning an average annual return of 7.1 per cent; that it was not being efficiently operated; that the management had failed to introduce certain economies previously recommended which would have increased its net earnings; and that for these reasons the existing five-cent fare was just and reasonable. The Commission may have erred in its judgment, but it is clear that it did not change the rate of fare. In *Georgia Ry. & Power Co.* v. *Decatur,* 262 U. S. 432, 439, it was held that the assumption of jurisdiction by the Commission to the extent of affirmatively ordering the continuance of existing transfer privileges did not effect an abrogation of an existing contract provision relating thereto, since such action did not conflict with the terms of the contract. Compare *Los Angeles* v. *Los Angeles City Water Co.,* 177 U. S. 558, 578–84; *Minneapolis* v. *Street Ry. Co.,* 215 U. S. 417, 435. In *Denney* v. *Pacific Telephone Co.,* 276 U. S. 97, the Commission had previ-

ously granted an increase in fare of which the Company had availed itself.

Assuming that the Railway was bound by contract to maintain a five-cent fare, it could be relieved from its obligation only by the Commission. Had the Commission authorized an increase in fare, it would still be questionable whether the contract would have been thereby abrogated or only modified by making the Railway's obligation less onerous. Surely, the Commission's refusal to grant any help, because in its opinion none is needed, cannot have the anomalous effect of entirely relieving the Railway of its obligation.

Fourth. If the District Court erred in holding that the action taken in 1921 or 1928 had the effect of abrogating any existing contract, there must be a determination whether such contracts did exist, in fact and law. It was assumed by the District Court and by counsel in this Court that if the City lacked the power to bind itself contractually by the fare provisions, the Railway could not be bound thereby. This conclusion is not commanded by logic or by the law of contracts. Lack of power in the municipality to bind itself is a factor to be considered in determining whether the parties intended to enter into a contract. But, if they did, the Railway's promise need not fail for lack of mutuality. The law does not require that a particular contractual obligation must be supported by a corresponding counter-obligation. It is conceded that the City possessed the power to enter into the franchise contract. The contention is merely that it could not surrender its power to regulate rates. But there is nothing in the fare provisions to indicate that the City attempted to do that. These provisions in terms bind only the Railway. The Railway unquestionably had power to agree to charge a fixed fare. The grant of the franchise is sufficient consideration, if so intended, for any number of contractual obligations which the Railway may

have chosen to assume. In *Southern Iowa Electric Co.* v. *Chariton,* 255 U. S. 539, a case coming from Iowa, it was held, following Iowa decisions, that since the city lacked power to bind itself, there was no contract. And there is a statement to that effect in *San Antonio* v. *San Antonio Public Service Co.,* 255 U. S. 547, 556. But in *Southern Utilities Co.* v. *Palatka,* 268 U. S. 232, 233, the question was expressly left open. Obviously, that is a matter of state law on which the decisions of this Court are not controlling.

Fifth. If it be true that the Railway is not bound by the fare provisions, unless the City had power to bind itself in that respect, it is necessary to determine whether the City had that power and whether the parties did in fact contract as to the rate of fare. Whether the City had the power is, of course, a question of state law. In California, the constitution and the statutes leave the question in doubt. Counsel agree that there is no decision in any court of the State directly in point. They reason from policy and analogy. In support of their several contentions they cite, in the aggregate, 30 decisions of the California courts, 15 statutes of the State, besides 3 provisions of its code and 7 provisions of its constitution. The decisions referred to occupy 308 pages of the official reports; the sections of the constitution, code and statutes, 173 pages. Moreover, the 102 franchises here involved were granted at many different times between 1886 and 1927. And during that long period, there have been amendments both of relevant statutes and of the constitution. The City or the County may have had the power to contract as to the rate of fare at one time and not at another. If it is held that the City or the County ever had the power to contract as to rate of fare, it will be necessary to examine the 102 franchises to see whether the power was exercised. It may then be that some of the franchises contain valid fare contracts, while others

do not. In that event, the relief to be granted will involve passing also on matters of detail.

In my opinion, these questions of statutory construction, and all matters of detail, should, in the first instance, be decided by the trial court. To that end, the judgment of the District Court should be vacated and the case remanded for further proceedings, without costs to either party in this Court. Pending the decision of the trial court an interlocutory injunction should issue. Compare *City of Hammond* v. *Schappi Bus Line,* 275 U. S. 164; *City of Hammond* v. *Farina Bus Line & Transportation Co.,* 275 U. S. 173; *Ohio Oil Co.* v. *Conway,* 279 U. S. 813. It is a serious task for us to construe and apply the written law of California. Compare *Gilchrist* v. *Interborough Rapid Transit Co.,* 279 U. S. 159, 207–209. To "one brought up within it, varying emphasis, tacit assumptions, unwritten practices, a thousand influences gained only from life, may give to the different parts wholly new values that logic and grammar never could have got from the books." *Diaz* v. *Gonzalez,* 261 U. S. 102, 106. This Court is not peculiarly fitted for that work. We may properly postpone the irksome burden of examining the many relevant state statutes and decisions until we shall have had the aid which would be afforded by a thorough consideration of them by the judges of the District Court, who are presumably more familiar with the law of California than we are. The practice is one frequently followed by this Court.[1]

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[1] This course was pursued in the following, among other cases, in which a lower Federal court erroneously left undecided a question of local law or of its application, *Gainesville* v. *Brown-Crummer Co.,* 277 U. S. 54, 61, *Hammond* v. *Schappi Bus Line,* 275 U. S. 164, 169–72, *Hammond* v. *Farina Bus Line,* 275 U. S. 173, 174–5, *Wilson Cypress Co.* v. *Del Pozo,* 236 U. S. 635, 656–7; in the following cases in which the lower court erroneously left undetermined a question of fact, *Security Mortgage Co.* v. *Powers,* 278 U. S. 149, 159, *United*

In the case at bar, there are persuasive reasons for adopting the course suggested. The subject matter of this litigation is local to California. The parties are all citizens of that State and creatures of its legislature. Since the Railway denies that there ever was a valid contract governing the rate and asserts that if any such existed they have been abrogated, the contract clause of the Federal Constitution is not involved. The alleged existence of contracts concerning the rate of fare presents

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States v. *Magnolia Co.*, 276 U. S. 160, 164–5, *United States* v. *Brims*, 272 U. S. 549, 553, *Gerdes* v. *Lustgarten*, 266 U. S. 321, 327, *Chastleton Corp.* v. *Sinclair*, 264 U. S. 543, 548–9, *Vitelli & Son* v. *United States*, 250 U. S. 355, 359, *Southern Pacific Co.* v. *Bogert*, 250 U. S. 483, 494, 497, *Union Pac. R. R. Co.* v. *Weld County*, 247 U. S. 282, 287, *Marconi Wireless Co.* v. *Simon*, 246 U. S. 46, 57, *Owensboro* v. *Owensboro Waterworks*, 191 U. S. 358, 372, *Chicago, Milwaukee &c. Ry.* v. *Tompkins*, 176 U. S. 167, 180; in the following cases in which the Circuit Court of Appeals did not review the merits because of an erroneous view of the jurisdiction of the District Court, *Guardian Savings Co.* v. *Road Dist.*, 267 U. S. 1, 7, *Brown* v. *Fletcher*, 237 U. S. 583, 586–8, *cf. Louie* v. *United States*, 254 U. S. 548, 551; in the following cases in which the Circuit Court of Appeals restricted its review because it erroneously regarded the action as one at law instead of a suit in equity, *Twist* v. *Prairie Oil Co.*, 274 U. S. 684, 692, *Liberty Oil Co.* v. *Condon Bank*, 260 U. S. 235, 245; in the following cases in which the Circuit Court of Appeals erroneously narrowed the scope of its review for other reasons, *Krauss Bros. Co.* v. *Mellon*, 276 U. S. 386, 394, *National Brake Co.* v. *Christensen*, 254 U. S. 425, 432; in the following cases in which the State court placed its decision on an erroneous view of federal law, and, therefore, did not consider the questions of local law involved, *Chicago & N. W. Ry.* v. *Durham Co.*, 271 U. S 251, 257–8, *Sioux City Bridge Co.* v. *Dakota County*, 260 U. S. 441, 445–7, *Ward* v. *Love County*, 253 U. S. 17, 25. In all of these cases, this Court recognized its undoubted power to decide the matters erroneously left undetermined by the courts below; but it preferred to remand the cases for further proceedings, either on the ground that the determination of the undecided issues was too burdensome a task, or on the ground that those issues should more appropriately be decided, in the first instance, by the lower courts.

the fundamental issue of the case. Whether such contracts exist, or ever existed, depends wholly upon the construction to be given to laws of the State. Upon these questions, the decision of the Supreme Court of California would presumably have been accepted by this Court, if the case had come here on appeal from it. Compare *Georgia Ry. & Power Co.* v. *Decatur*, 262 U. S. 432, 438; *Appleby* v. *City of New York*, 271 U. S. 364, 380.

The constitutional claim of confiscation gave jurisdiction to the District Court. We may be required, therefore, to pass, at some time, upon these questions of state law. And we may do so now. But the special province of this Court is the Federal law. The construction and application of the Constitution of the United States and of the legislation of Congress is its most important function. In order to give adequate consideration to the adjudication of great issues of government, it must, so far as possible, lessen the burden incident to the disposition of cases, which come here for review.[2]

MR. JUSTICE HOLMES joins in this opinion.

MR. JUSTICE STONE, dissenting.

I agree with Mr. Justice Brandeis that this case should have been disposed of by remanding it to the district court of three judges for determination whether the railway company, under its 102 franchises, or any of them, is bound by contract to maintain a five-cent fare. That question is I think different from the one presented in *Home Telephone Co.* v. *Los Angeles*, 211 U. S. 265, and

[2] Compare "Distribution of Judicial Power between the United States and State Courts," by Felix Frankfurter, XIII Cornell Law Quarterly, 499, 503; "The Business of the Supreme Court at October Term 1928," by Frankfurter and Landis, XLIII Harvard Law Review, 33, 53, 56, 59–62.

involved in *Detroit* v. *Detroit Citizens Railway Co.*, 184 U. S. 368; *Vicksburg* v. *Vicksburg Water Works Co.*, 206 U. S. 496, whether the city had the requisite legislative authority to bind itself not to reduce the rate of fare fixed by the franchise. Here concededly the power to regulate rates is reserved to the state commission and the question preliminary to the whole case is whether the railroad company has bound itself to serve for a five-cent fare. I know of no principle of the law of contracts, *qua* contracts, which would preclude its doing so, even though the city had no power to obligate itself to maintain any particular rate. It has not purported to exercise such power by so contracting. It had power to grant franchises and the grant of the franchise without more would be good consideration for the company's undertaking to maintain a five-cent fare. Williston on Contracts, §§ 13, 140.

The provision of the statute of April 7, 1913, enacted after the decision in *Home Telephone Co.* v. *Los Angeles, supra,* authorizing the city to grant franchises and "to prescribe the terms and conditions" of the grant, and that of the act of June 8, 1915, authorizing the grantor of the franchise to impose terms and conditions "whether governmental or contractual in character," to quote no others, would seem to permit the city to acquire by the mere grant of the franchise, without other obligation on its part, such contractual undertakings on the part of the railroad company as did not contravene the public interest.

If there be any public policy forbidding the company so to bind itself or forbidding the city to take advantage of the undertaking so given and acquired, it is one peculiar to local law, having its origin in local history and conditions, and so is peculiarly an appropriate subject for consideration, in the first instance, by the court of the district.

But as the Court, without dealing with this aspect of the matter, has held that the railway company is not so bound, it is unnecessary to decide that the state railroad commission's refusal to raise the rate would have been enough to abrogate the contract, if there had been one, and the practice of the Court not to pass on questions of constitutional or state law not necessary to a decision should, I think, be scrupulously observed. Even if necessary to decide the question, I would not be prepared to say that the refusal of the commission to fix a fare different from the contract rate would destroy the contract. By contracting for a five-cent fare, the railway company waived the protection of the due process clause of the Fourteenth Amendment. *Columbus Ry. Co.* v. *Columbus,* 249 U. S. 399; *Southern Iowa Electric Co.* v. *Chariton,* 255 U. S. 539, 542; *Paducah* v. *Paducah Ry. Co.,* 261 U. S. 267, 272; *Georgia Ry. Co.* v. *Decatur,* 262 U. S. 432, 438; *Henderson Water Co.* v. *Corporation Commission,* 269 U. S. 278, 281. Granting that the contract was subject to the power and duty of the commission to modify it by changing the rate, that power has not been exercised and the duty is one arising, not under the Constitution and laws of the United States, but is imposed by state statute, for breach of which a state remedy alone should be given. See *Henderson Water Co.* v. *Corporation Commission, supra,* 282 (compare *Corporation Commission* v. *Henderson Water Co.,* 190 N. C. 70).

EX PARTE HOBBS, COMMISSIONER OF INSURANCE OF THE STATE OF KANSAS, ET AL.

ON PETITION FOR A WRIT OF MANDAMUS.

No. 20, Original. Argued November 25, 26, 1929.—Decided December 9, 1929.

A fire insurance company sued to enjoin state officers from enforcing an order fixing its rates, and from revoking its license for failure to obey the same, alleging diversity of citizenship and

that the order, and certain state statutes if construed to sanction it, were violative of the due process clause of the Fourteenth Amendment. The bill prayed for an interlocutory injunction on these grounds, but the plaintiff without pressing them applied for and obtained an interlocutory injunction enjoining the revocation of license only and based on the ground that such revocation would not be authorized by the state statutes, considering them as valid. Defendants applied to this Court for a mandamus to compel the District Judge to call to his assistance two other judges under Jud. Code § 266, U. S. C., Title 28, § 380, to determine the prayers for interlocutory and final injunction as made in the bill. *Held:*

1. That the scope of the judge's decision was to be determined by the words of his order, which accorded with the statement of his intention in granting it contained in his return to the order to show cause. P. 172.
2. That the decision, as so explained, being based only on a construction of the state statutes, three judges were not required by Jud. Code § 266 for its rendition, and, as there was jurisdiction by diversity of citizenship, appeal lay to the Circuit Court of Appeals. *Id.*
3. The fact that the bill raised the constitutional issue did not empower the defendants to force a decision of it or prevent the plaintiff from limiting to the narrower ground its claim to interlocutory relief. *Id.*

PETITION for a writ of mandamus to require the Honorable John C. Pollock, District Judge, to call to his assistance two other judges to determine the prayers for interlocutory and final injunctions in the suit of the Agricultural Insurance Company, and other like suits, pending in his district against the Insurance Commissioner and the Attorney General of Kansas. The matter was heard upon the petition and the return made by the respondent to a rule to show cause. The rule is discharged and mandamus denied.

Mr. John G. Egan, Assistant Attorney General of Kansas, with whom *Messrs. Wm. A. Smith,* Attorney General, *John F. Rhodes,* Assistant Attorney General, and *Wm. C. Ralston* were on the brief, for petitioners.

Mr. Robert J. Folonie, with whom *Messrs. Robert Stone* and *James A. McClure* were on the brief, for respondent.

MR. JUSTICE HOLMES delivered the opinion of the Court.

This is a petition for a writ of mandamus directing Judge Pollock, of the District Court of the United States for the District of Kansas, to call to his assistance two other Judges under § 266 of the Judicial Code as amended, (U. S. Code, Title 28, § 380,) to determine the prayer for interlocutory and final injunctions against the petitioners in certain suits. An order to show cause was issued and the Judge has made a return. We are of opinion that the writ must be denied upon the incontrovertible portions of the return, and therefore need to consider nothing else.

One hundred and fifty stock fire insurance companies doing business in Kansas have bills in equity, of which the bill considered in this case is a type, pending in the District Court of the United States for the District of Kansas. These bills allege diversity of citizenship and also that the defendant Commissioner of Insurance, one of the present petitioners, has made an order affecting the rates to be charged for the issue of policies of fire insurance that is confiscatory and contrary to the Fourteenth Amendment, but that if not obeyed he will enforce by revoking the plaintiffs' licenses to do business in Kansas. The bills also allege that the statutes of Kansas as construed to authorize the order are unconstitutional like it and for the same reason. The bills pray for a restraining order *ad interim,* an interlocutory injunction after a hearing before three Judges, and a permanent injunction by final decree.

On April 3, 1928, the parties appeared before the present respondent, and on his suggestion the defendants, the present petitioners, agreed to take no action that

would be subject to restraint by a temporary restraining order, without first giving notice of intention to do so in ample time for the plaintiff to resort to the Court. An order embodying the agreement and stating that the Court therefore refrained from entering any temporary restraining order was entered at that date, and remained in force for over a year. Shortly after the entry the petitioners presented to the Judge a motion to dismiss the suit, on the ground that the matter was *res judicata* by reason of certain proceedings in the State Court, and also for want of equity, which after argument was overruled. On May 10, 1929, the case was referred to a Master to make findings of fact and conclusions of law concerning the issues in the case. This was upon motion of the plaintiff made on May 4. On May 6 the defendants, the petitioners, notified the plaintiff that they would proceed to enforce the rate order on and after May 20, 1929, and on May 7 filed a motion for a hearing before three Judges, on the plaintiff's application for an interlocutory injunction. This came up on May 10 along with the plaintiff's motion to refer to a Master. The plaintiff " definitely stated that it did not intend to press its prayer contained in its bill of complaint "; meaning thereby its prayer for an interlocutory injunction based upon the asserted unconstitutionality of the Statute and rate orders, and the Judge said that the defendants' motion did not pertain to any matter before the Court, and intimated that he was ready to grant a restraining order. A few days later the plaintiff moved for an interlocutory injunction against the cancellation of the licenses of the plaintiff and its agents. The defendants objected and asked the Judge to call in two others. This the Judge declined to do and issued an order restraining the defendants from cancelling licenses because of supposed violations of the rate order in question. The defendants treat this as satisfying the prayers of the bill and requiring three Judges to be within the jurisdiction of the Court to grant.

The Judge knows at least what he intended and supposed himself to do. He states that it appeared to him that the only question before him was the construction of the rate-making statute of Kansas, the plaintiff conceding its constitutionality for the purposes of the motion. He construed the act as not warranting a revocation of licenses for violation of the rate order or for anything that the plaintiff appeared to have done, and says that the injunction granted by him was not granted upon the ground of the unconstitutionality of the statute but restrained only something that by his construction the statute did not allow. We see no reason why the injunction should be held to go further than the Judge says that he intended it to go, or than its express words, or why those words should not be explained as a construction of the statute rather than an adjudication that it is void. But if the injunction is taken as we say that it should be, it is not within Judicial Code, § 266; three Judges were not necessary, and the petitioners have no right to come here. *Ex parte Buder,* 271 U. S. 461. *Moore* v. *Fidelity & Deposit Co.,* 272 U. S. 317. *Smith* v. *Wilson,* 273 U. S. 388. On the other hand as there was jurisdiction of the cases by reason of diversity of citizenship, as well as on the constitutional ground, an appeal lay to the Circuit Court of Appeals if the petitioner thought the Judge's construction wrong. The Judge was clearly right in treating the plaintiffs in the several cases as masters to decide what they would ask and in denying to the defendants, the petitioners, the power to force upon the plaintiffs a constitutional issue which at that moment they did not care to raise. The fact that the bills raised it did not prevent them from presenting a narrower claim and contenting themselves with the granting of that. Other serious difficulties in the way of the petition are set up in the return, but we think that the foregoing answer makes further argument unnecessary.

Rule to show cause discharged.
Mandamus denied.

LUCKENBACH STEAMSHIP COMPANY *v.* UNITED STATES.

CERTIORARI TO THE COURT OF CLAIMS.

No. 49. Argued December 4, 5, 1929.—Decided January 6, 1930.

1. Ports in the Canal Zone are to be regarded as foreign ports within the meaning of Rev. Stats. § 4009, U. S. Code, Title 39, § 654, dealing with the compensation allowable for transportation of mail, by United States ships, between the United States and "any foreign port." P. 177.

So *held* because of a long continued legislative and administrative construction of the section in its application to the Canal Zone, and without regard to whether under the treaty of cession titular sovereignty over the Zone remains in the Republic of Panama.

2. In case of ambiguity, a construction of a statute by the department charged with its execution should be favored by the courts, and where such construction has been acted on for a number of years they will look with disfavor upon any sudden change whereby parties who have contracted with the Government on the faith of it may be prejudiced. P. 182.

66 Ct. Cls. 679, reversed.

CERTIORARI, 279 U. S. 831, to review a judgment dismissing a claim for a balance due the Steamship Company for transporting mails.

Mr. George A. King, with whom *Messrs. William B. King* and *George R. Shields* were on the brief, for petitioner.

The ports of the Canal Zone are "foreign" within the meaning and for the purposes of the mail transportation statute, Rev. Stats. §4009.

Article II of the Panama Treaty grants "in perpetuity the use, occupation and control" of the Canal Zone for designated purposes and Article III grants all the rights, power and authority within the Zone, "which the United States would possess and exercise if it were the sovereign

of the territory." Article XIV provides an annual payment, *quasi* rent. This is obviously very different in legal theory and in ultimate possibility, however it may be in present practice, from transferring all sovereign power to the United States. It leaves the Canal Zone in a different category from Hawaii, Porto Rico, and the Philippines, where sovereignty was ceded. Joint Resolution of July 7, 1898, 30 Stat. 750; treaty proclaimed April 11, 1899, 30 Stat. 1755, 1756.

This difference is strongly accentuated in the series of statutes enumerated in the opinion below, where special words were repeatedly used to include the Canal Zone within their provisions or within the term "United States" or "Territory of the United States" or "Territory."

Three departments—Justice, Labor, and Treasury—besides the Post Office Department and the General Accounting Office, treat the Canal Zone when described in United States statutes as coming under the head of "foreign" territory. *United States* v. *Moore,* 95 U. S. 760; *United States* v. *Johnston,* 124 U. S. 236; *Schell's Executors* v. *Fauché,* 138 U. S. 562; *Alabama G. S. R. Co.* v. *United States,* 142 U. S. 615; *United States* v. *Minnesota,* 270 U. S. 181.

Assistant Attorney General Sisson, with whom *Solicitor General Hughes* and *Messrs. George C. Butte,* Special Assistant to the Attorney General, and *Louis R. Mehlinger* were on the brief, for the United States.

Under the provisions of the treaty between the Republic of Panama and the United States, the cities of Cristobal and Balboa in the Canal Zone are ports of the United States and the waters of the Panama Canal are waters of the United States.

The executive and judicial branches of the Government of the United States have always exercised, and are now

exercising, the powers and rights of sovereignty within the Canal Zone.

Ever since it was acquired, the Canal Zone has been considered and treated by the legislative branch of the Government as a possession of the United States and not as a foreign country.

The contention that the Canal Zone ports are not ports of the United States, but are "foreign ports" within the meaning of § 4009 of the Revised Statutes, is not supported by the provisions of Articles II and III of the treaty or by the course of legislation in Congress since the Canal Zone was acquired by the United States.

The fact that certain officials of the United States have dealt with the Canal Zone on a basis which does not recognize it as a possession of the United States is not conclusive of its status as a territorial possession of the United States.

There can be no question that the Canal Zone was acquired and is held by the United States under a perpetual grant which, for all practical purposes, conferred upon and vested in the United States all the rights, power, and authority of a sovereign, and that the United States has exercised full sovereign rights over the Canal Zone ever since the strip of land was acquired.

All doubt as to the character of the title of the United States in and to the Canal Zone has been conclusively removed by the decision of this Court in the case of *Wilson* v. *Shaw,* 204 U. S. 24.

An unauthorized and illegal practice prevailing among officers of the Government, no matter how long continued, can never ripen into a binding usage. *Peirce* v. *United States,* 1 Ct. Cls. 270; *The Floyd Acceptances,* 7 Wall. 666; *Houghton* v. *Payne,* 194 U. S. 88.

The Act of July 3, 1926, 44 Stat. 900, amending § 4009, Rev. Stats., contains no provision which even impliedly makes it retroactive. *White* v. *United States,* 191 U. S.

545; *United States* v. *Claflin,* 97 U. S. 546; *U. S. Fidelity Co.* v. *Struthers Wells Co.,* 209 U. S. 306; *Cox* v. *Hart,* 260 U. S. 427.

In the absence of a contract specifying the rates to be paid for the services, the petitioner is entitled to no more than what they are reasonably worth. *United States* v. *Moore,* 95 U. S. 760; *United States* v. *Johnston,* 124 U. S. 236; *Alabama G. S. R. Co.* v. *United States,* 25 Ct. Cls. 30; *McCann* v. *United States,* 18 Ct. Cls. 445; *United States* v. *Jones,* 18 How. 92.

Opinion of the Court by Mr. Chief Justice Taft, announced by Mr. Justice Van Devanter.

This was a suit in the Court of Claims by the Luckenbach Steamship Company, petitioner, against the United States to recover $30,370.94 claimed by the petitioner as a balance due for transporting mails of the United States, in steamships of United States registry, between ports of the United States and ports in the Canal Zone, from December 1, 1925, to June 30, 1926. Judgment went against the petitioner, 66 C. Cls. 679, and a petition to this Court for a review on certiorari was granted.

That the petitioner rendered the service stated and did so at the request of the Postmaster General is not questioned. The only matter in dispute is the true measure of compensation. The Postmaster General allowed the sum of $82,851.62 and transmitted approved vouchers therefor to the General Accounting Office for direct settlement; but that office reduced the allowance to $52,480.68 and caused this reduced sum to be paid to the petitioner. Thereupon suit was brought for the balance.

The Postmaster General in making his allowance proceeded on the theory that the compensation was to be determined according to § 4009 of the Revised Statutes; but the General Accounting Office regarded that section as inapplicable. If the section was applicable, the Post-

master General's allowance was right and should have been given effect by the Court of Claims.

Section 4009, which originally was part of the Act of June 8, 1872, c. 335, § 269, 17 Stat. 316, consolidating and amending the statutes relating to the Post Office Department, reads as follows:

"Sec. 4009. For transporting the mail between the United States and any foreign port, or between ports of the United States touching at a foreign port, the Postmaster-General may allow as compensation, if by a United States steamship, any sum not exceeding the sea and United States inland postage; and if by a foreign steamship or by a sailing-vessel, any sum not exceeding the sea-postage, on the mail so transported."

The specific point of difference between the Postmaster General and the General Accounting Office was that the former treated the ports in the Canal Zone as foreign ports within the meaning of that section, while the latter regarded them as domestic ports.

The rights possessed by the United States within the Canal Zone were acquired from the Republic of Panama under the treaty of November 18, 1903, 33 Stat. 2234. The Zone has a width of ten miles and extends across the Isthmus of Panama and into the sea at either end for a distance of three marine miles from mean low water mark; but the cities of Panama and Colon and the harbors adjacent to them, although within the outer boundaries of the Zone, are expressly excepted therefrom by the second article of the treaty.

Whether the grant in the treaty amounts to a complete cession of territory and dominion to the United States or is so limited that it leaves at least titular sovereignty in the Republic of Panama, is a question which has been the subject of diverging opinions [1] and is much discussed in the

[1] 20 Am. Journal International Law, pp. 120–122; Isthmian Highway, Miller, p. 221; *Wilson* v. *Shaw*, 204 U. S. 24, 32–33.

briefs. But for the purposes of this case the construction of the treaty in that regard need not be examined as an original question;—and this because a long continued course of legislative and administrative action has operated to require that the ports in the Canal Zone be regarded as foreign ports within the meaning of § 4009.

By the Act of March 2, 1905, c. 1311, 33 Stat. 843, which came within less than two years after the treaty, Congress declared that the laws regulating the importation of merchandise and the entry of persons into the United States from foreign countries should apply to and control the importation of merchandise and the entry of persons from the Canal Zone into any State or Territory of the United States or the District of Columbia; and on September 8, 1909, 27 Op. Atty. Gen. 594, the Attorney General, in an opinion given to the Secretary of War, held that the Canal Zone was not a possession of the United States within the meaning of the Tariff Act of August 5, 1909, c. 6, 36 Stat. 11, imposing specified rates of duty upon various articles when imported from a foreign country into the United States or "into any of its possessions."

In 1911 the Postmaster General, being authorized by an Act of March 3, 1891, c. 519, 26 Stat. 830, to arrange for the transportation of mails in American steamships between ports in the United States and foreign ports, submitted to the Attorney General the question whether, as respects mails largely intended for the cities of Colon and Panama, it would be within the letter and spirit of that Act to arrange for the carrying of such mails from the ports of New York and San Francisco to the government docks at Cristobal and Balboa in the Canal Zone. The Attorney General responded in the affirmative, saying, 29 Op. Atty. Gen. 194, 196:

"It appears from the papers transmitted by you that it will be more convenient for the vessels contracting for

this mail service to use principally the Government docks, which are being constructed at Cristobal on the Atlantic side and Balboa on the Pacific side; and the question arises whether by using these docks, which are in close proximity to but outside the limits of the cities of Colon and Panama and within the Canal Zone, the vessels would be carrying mails to foreign ports. It is stated in this connection that docking the large vessels at the cities of Colon and Panama would result in serious loss of time, and that the actual call at these places could be obviated by the use of a tender to meet the vessels upon entering the 'harbor adjacent to these ports' to receive and deliver the mail in Colon and Panama, the vessels then proceeding to the Government docks at Cristobal and Balboa.

"It has been held that the purpose of the act of March 3, 1891, is 'to promote the carriage of the ocean mails in ships of American register, and thereby to promote ocean commerce in American bottoms,' and that this statute, 'designed to promote foreign commerce, is entitled to a liberal construction, with a view of carrying out the purpose of its enactment.' (20 Op. 98, 101.)

"In my opinion, the service proposed is in substantial compliance with the letter and spirit of the statute, as being between 'ports of the United States' and 'ports of foreign countries.' The word 'port' is not limited in its application to the city which bears the same name, but has been defined as including the entire harbor, within its inclosures and projections of land, where ships take refuge and seek shelter. [Citing authorities.] Construing the word 'port' as synonymous with 'harbor' the vessels unquestionably would be carrying the mails to a foreign port if they entered the harbor, since the treaty reserves to Panama not only the cities of Panama and Colon, but also 'the harbors adjacent to said cities.' In any event, I think that carrying the mails upon such vessels within

such close proximity to said cities that they might safely be landed in a small boat would be a substantial compliance with the terms of the act."

By § 12 of an Act of August 24, 1912, c. 390, 37 Stat. 569, Congress, while extending to the Canal Zone the laws of the United States relating to extradition and the rendition of fugitives from justice, declared that for such purposes, "and such purposes only," the Zone should be treated as an organized Territory of the United States, and by § 9 of an Act of August 21, 1916, c. 371, 39 Stat. 529, Congress provided that the laws of the United States relating to seamen of vessels of the United States when "on foreign voyages" should apply to the seamen of all vessels of the United States when in the Canal Zone.

In 1925, the Department of Labor, construing a provision in the Immigration Act of February 5, 1917, c. 29, 39 Stat. 874, relating to seamen on board vessels arriving in the United States from "any foreign port or place," ruled that the ports in the Canal Zone should be deemed foreign ports in the sense of that Act, Par. 4, Rule 6, Immigration Laws and Rules of 1925; and in 1926 the Comptroller General held that, as ports in the Canal Zone are considered foreign ports in the absence of special provision to the contrary, an alien seaman shipping on an American vessel from a port in the Canal Zone is limited in the matter of relief to such as may be extended to an alien seaman shipping on an American vessel from a foreign port. 5 Dec. Comp. Gen. 647.

True, there have been instances in which Congress specially provided that for particular purposes the Canal Zone should be treated as a Territory or possession of the United States. This is illustrated in the provision already cited relating to extradition and the rendition of fugitives from justice, and in the acts relating to the liability of carriers by railroad for injuries suffered by their employes,

c. 149, 35 Stat. 5, to espionage, c. 30, title 13, 40 Stat. 231, and to sabotage, c. 59, 40 Stat. 533. But the purposes for which these special provisions were made were such that nothing was subtracted thereby from the force of the provisions before mentioned wherein, for purposes connected with importation, immigration and ocean transportation between the United States and the Canal Zone, Congress required that ports in the latter be regarded as foreign ports.

For a period of years and continuously to December 1, 1925, the Postmaster General tendered to the petitioner and the latter accepted for transportation in American steamships, and so transported for the United States, large quantities of mail between the United States and ports in the Canal Zone; and for this service the petitioner was paid the compensation intended by § 4009,—the Postmaster General and the accounting officers treating the ports in the Canal Zone as foreign ports in the sense of that section.

The service just described was continued without break into and through the period here in controversy—December 1, 1925, to June 30, 1926—and the Postmaster General, still treating the Canal Zone ports as foreign ports, allowed the same compensation as before. For this period, and this alone, the accounting officers declined to regard those ports as foreign ports. The service was continued after the period in question and for this later service the Postmaster General and the accounting officers concurred in allowing the compensation intended by § 4009, the accounting officers resting their assent upon an Act of Congress of July 3, 1926, c. 793, 44 Stat., Part 2, 900.

It thus appears, as was said by the Postmaster General in a letter of July 23, 1926, to the petitioner, that the Post Office Department from the outset and continuously up to and through the period in question "considered

the service to the Canal Zone as being in the same category as that to a foreign country" and approved compensation vouchers on that basis.

This recitation of pertinent legislative and administrative action demonstrates that this case is one in which we should apply the rule announced in *United States* v. *Alabama Southern R. Co.*, 142 U. S. 615, 621, where it was said:

"We think the contemporaneous construction thus given by the executive department of the government, and continued for nine years through six different administrations of that department—a construction which, though inconsistent with the literalism of the act, certainly consorts with the equities of the case—should be considered as decisive in this suit. It is a settled doctrine of this court that, in case of ambiguity, the judicial department will lean in favor of a construction given to a statute by the department charged with the execution of such statute, and, if such construction be acted upon for a number of years, will look with disfavor upon any sudden change, whereby parties who have contracted with the government upon the faith of such construction may be prejudiced."

Our conclusion also has obvious support in the Act of July 3, 1926, *supra*, whereby § 4009 was reënacted in a form which undoubtedly puts ports in the Canal Zone on the same plane as foreign ports for the purposes of that section. The committee reports relating to that enactment show that it was particularly designed to meet and avoid the adverse ruling of the General Accounting Office, and to continue the prior course of action respecting the measure of compensation to be paid for carrying mails between the United States and the Canal Zone; that it was intended to recognize, as the prior practice did, that for "all practical purposes" such mails "are foreign mails"; and that the purpose of the act was not to

alter the rates paid to American ships, "but to clarify the law." House Report No. 1305, 69th Cong., 1st Sess.; Senate Report No. 1096, 69th Cong., 1st Sess.; House Report No. 1788, 70th Cong., 1st Sess.; Annual Report Postmaster General, 1927, p. 46.

We hold, therefore, that on the findings of the Court of Claims set forth in the record, judgment should have been given the petitioner for the balance of $30,370.94.

Judgment reversed.

UNITED STATES *v.* JACKSON ET AL.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 57. Argued December 5, 1929. Decided January 6, 1930.

1. An Indian who, being a ward of the United States, has entered land under the Homestead Law, as permitted by the Act of July 4, 1884, c. 180, 23 Stat. 96, and, pursuant to the latter enactment, has received a "trust patent" under which the title is to be held in trust for him by the United States for twenty-five years and at the expiration of that period is to be conveyed to him discharged of the trust, has no vested right which would be unconstitutionally impaired by an enlargement of the period of restriction. P. 189.
2. The United States, in virtue of its guardianship over the Indians, may during the period of restriction provide for its extension. *Id.*
3. The Act of June 21, 1906, 34 Stat. 326, which provides "That prior to the expiration of the trust period of any Indian allottee to whom a trust or other patent containing restrictions upon alienation has been or shall be issued under any law or treaty the President may in his discretion continue such restrictions on alienation for such period as he may deem best . . ." applies to Indians who, under the Act of July 4, 1884, *supra*, have entered public lands as homesteaders. P. 191.
4. Nothing herein contained must be taken as intimating that the Act of June 21, 1906, has any application to the acquisition of homestead rights under the general homestead laws by persons of the Indian race who have acquired or seek to acquire such rights as citizens rather than as Indian wards of the United States. P. 197.

5. A construction consistently given a statute by an executive department charged with its enforcement should be allowed great weight and not be overthrown unless a different construction is plainly required. P. 193.

Opinion of District Court, 27 F. (2d) 751.

The following statement is by the Chief Justice, preceding the opinion:

In accordance with the provisions of the Act of Congress of July 4, 1884, c. 180, § 1, 23 Stat. 76, 96; U. S. C., Title 43, § 190, the United States, on December 11, 1891, issued to Jack Williams, an Indian, a trust patent on certain lands. The patent recited that the United States would hold the lands in trust for the sole use and benefit of Williams, or, in case of his decease, of his widow and heirs, for a period of 25 years from the date thereof, and that at the expiration of such time the United States would convey the land to Williams, or his widow or heirs, in fee and free of the trust or any incumbrance whatever.

Before the expiration of the 25 year trust period, Williams died, and his interest in the land passed to his widow and sole heir, Nellie Williams, an Indian woman. She held the land until March 18, 1921—more than four years after the trust period, by its terms, would have expired—and then deeded it to Jack Jackson, also an Indian. In the succeeding year—October 10, 1922—she died leaving a will by which the same property was devised to Bob Roberts, a tribal Indian.

The deed to Jackson was recorded November 3, 1922; but the Secretary of the Interior has never approved it.

Nellie Williams' will, and the devise to Roberts therein contained, were approved by the Secretary of the Interior, December 1, 1923.

This is a suit by the United States against the heirs of Jack Jackson. It is brought on behalf of Bob Roberts, and its purpose is to quiet title in him to the lands in question. The position of the United States is that,

while it is true that the deed to Jackson was made after the original 25 year trust period, with its attendant restrictions on alienation, had, by the terms of the trust patent, expired, it further appears that the restrictions on the alienation of this land by Williams or his heirs has been continued in force and extended by a series of one-year executive orders from 1916 to 1919, and by a further 25-year executive order issued in 1920. The executive orders in question were, it is urged, authorized by the Act of Congress of June 21, 1906, c. 3504, 34 Stat. 325, 326.

The United States therefore argued that the deed to Jackson, having been made while there was a restriction on alienation, and not having been approved by the Secretary of the Interior, was void.

The District Court, 27 F. (2d) 751, held that the Act of June 21, 1906 did not authorize the President to continue the restrictions on alienation contained in the patent issued to Williams. The purpose of the 1906 Act, said the District Court, was to permit the continuation of restrictions in patents issued to Indian *allottees,* that is, to Indians who received patents under the General Allotment Act of February 8, 1887, which created the Indian allotment system, or under any of its subsequent amendments; but that the 1906 Act did not purport to give the President a like power with respect to Indians who received their patents under the Act of July 4, 1884, which conferred homestead entry rights upon Indians.

The court therefore held that the restrictions on the alienation of this land had expired at the time Williams' widow deeded it to Jackson; that there was no statute expressly extending the restrictions, and no statute authorizing the President so to do; that the deed to Jackson conformed to the law of the State where it was executed, and it was valid.

The United States appealed to the Circuit Court of Appeals for the Ninth Circuit. The judges of that court, being in doubt, have certified to us, conformably to § 239 of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936, 938, U. S. C., Title 28, § 346, the two following questions of law concerning which our instruction is desired for the proper decision of the cause:

"1. Could the trust period and the restriction of alienation in an Indian homestead patent issued under the act of July 4, 1884, (43 U. S. C. A. sec. 190), be extended by Executive orders?

"2. Did the act of June 21, 1906 (25 U. S. C. A. sec. 391) authorize the President in his discretion to continue restrictions on alienation in patents issued under the Indian homestead act of July 4, 1884? (43 U. S. C. A. sec. 190)."

Assistant Attorney General Richardson, with whom *Solicitor General Hughes* and *Mr. Pedro Capo-Rodriguez* were on the brief, for the United States.

Congress, in the exercise of its constitutional powers over the Indians, could authorize the President, in his discretion, to continue the restrictions on alienation in patents issued to Indians under the Act of July 4, 1884. *United States* v. *Kagama*, 118 U. S. 375; *United States* v. *Nice*, 241 U. S. 591.

Under the original Homestead Act of May 20, 1862, c. 75, 12 Stat. 392, the right to enter a homestead was limited to citizens of the United States, or those who had filed their declaration of intention to become such. Indians were not citizens and could not be naturalized, except by Act of Congress, *Elk* v. *Wilkins*, 112 U. S. 94. No such authority had been generally granted at the time of the Homestead Act. Consequently, an Indian could not originally enter a homestead. *United States* v. *Joyce*,

240 Fed. 610. Later, as the general policy of the Government to grant lands in severalty to the Indians was being developed, either by means of treaty with the Indian tribes, as such, or through special acts of Congress, laws were successively enacted gradually extending the benefit of the homestead laws to certain classes of Indians, obviously with the purpose of encouraging them to abandon their tribal customs and relations, to attain a self-supporting station, and to become useful and law-abiding citizens. See the Acts of March 3, 1865, c. 127, 13 Stat. 541; March 3, 1875, c. 131, 18 Stat. 402; January 18, 1881, c. 23, 21 Stat. 315. Then came the Indian Homestead Act of July 4, 1884, which was designed to permit all Indians, whether tribal or not, to avail themselves of the benefit of the homestead laws as fully and to the same extent as might be done by citizens of the United States (*United States* v. *Joyce,* 240 Fed. 610; *Hemmer* v. *United States,* 204 Fed. 898; *United States* v. *Hemmer,* 241 U. S. 379), not as citizens but as Indians. See opinion in the case of *Frank Bergeron,* 30 L. D. 375.

In this case, the District Court does not seem to question the proposition that Congress during the continuance of the guardianship had ample power to extend the trust period or limitations upon the power of alienation of Indian homesteads. The existence of this power can not be doubted in view of *Tiger* v. *Western Investment Co.,* 221 U. S. 286; *Heckman* v. *United States,* 224 U. S. 413; and *Brader* v. *James,* 246 U. S. 88. Congress, having this power, could authorize the President to extend the period in his discretion, as it did by the first proviso of § 5 of the General Allotment Act. See *United States* v. *Reynolds,* 250 U. S. 104.

The Act of June 21, 1906, confers upon the President authority in his discretion to continue restrictions upon alienation for such period as he may deem best in cases where the trust or other patent has been issued under any

law or treaty to an Indian "allottee." The general rule of statutory construction is that the intention of the lawmaker, as disclosed by the language used, is to prevail; but when that intention does not clearly appear, recourse may be had to other sources of information to aid in the discovery of that intention. And for this purpose, the obvious policy of the Act (*Levindale Lead Co.* v. *Coleman,* 241 U. S. 432), the purposes of statutes *in pari materia,* especially if constituting part of a system (*United States* v. *Taylor,* 104 U. S. 216; *Tiger* v. *Western Investment Co.,* 221 U. S. 286; *United States* v. *Freeman,* 3 How. 556; *Heckman* v. *United States,* 224 U. S. 413; *United States* v. *Hemmer,* 241 U. S. 379), and the construction placed upon the same by the Executive Department in charge of their administration (*United States* v. *Cerecedo Hermanos y Compañia,* 209 U. S. 337; *Robertson* v. *Downing,* 127 U. S. 607; *United States* v. *Healey,* 160 U. S. 136) are to be given great weight.

The Interior Department has treated Indian homesteaders as being upon practically the same footing as Indian allottees, and as coming within the purview of the statutory provisions here involved. *Toss Weaxta,* 47 L. D. 574; *Jim Crow,* 32 L. D. 657; *Doc Jim,* 32 L. D. 291. This settled construction by the Department should not be overturned by the Court except for cogent reasons, and unless it is clearly wrong (*United States* v. *Hemmer, supra; United States* v. *Healey, supra; Hewitt* v. *Schultz,* 180 U. S. 139; *United States* v. *Finnell,* 185 U. S. 236; *United States* v. *Johnston,* 124 U. S. 236), or unless a different construction is plainly required. *Hawley* v. *Diller,* 178 U. S. 476.

No appearance for Jackson et al.

Opinion of the Court, by Mr. Chief Justice Taft, announced by Mr. Justice Van Devanter.

The statute under which the Indian, Jack Williams, secured his trust patent to the land here involved was

that of July 4, 1884, c. 180, 23 Stat. 96, the pertinent part of § 1 of which is printed in the margin.[1] Its purpose and effect were to extend to the Indian wards of the United States, subject, however, to the direction of the Secretary of the Interior, the privileges then enjoyed by citizens of the United States under the federal homestead laws. It was provided that patents issued to Indians for homestead lands under the Act should, however, recite that the United States holds the land in trust for the sole use and benefit of the Indian for a period of twenty-five years, and that at the expiration of such period the United States would convey the same by final patent to the Indian or his widow and heirs in fee and discharged of the trust. The trust patent here issued to Williams conformed to these requirements of the law.

The first question certified to us by the Circuit Court of Appeals is whether, after an Indian had acquired a trust patent under the provisions of this statute, power remained in the Congress to extend, or to provide that the Executive, in his discretion, might extend, before its expiration and before there had come to be issued to the Indian a patent in fee, the period of the trust with its

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[1] "That such Indians as may now be located on public lands, or as may, under the direction of the Secretary of the Interior, or otherwise, hereafter, so locate may avail themselves of the provisions of the homestead laws as fully and to the same extent as may now be done by citizens of the United States; . . . but no fees or commissions shall be charged on account of said entries or proofs. All patents therefor shall be of the legal effect, and declare that the United States does and will hold the land thus entered for the period of twenty-five years, in trust for the sole use and benefit of the Indian by whom such entry shall have been made, or, in case of his decease, of his widow and heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his widow and heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever."

resulting restrictions on alienation. We do not think that our decisions leave any doubt not only that it is within the power but that it is the duty of the Congress, where it finds conditions which warrant it, so to do. We have had frequent occasion to point out the duty of the United States to protect its wards, the Indians, and the consequent broad extent of its power over them and their affairs. *United States* v. *Kagama,* 118 U. S. 375, 384; *United States* v. *Nice,* 241 U. S. 591, 597. There is nothing in the Act of 1884 which indicates any disposition on the part of the United States to dispossess itself of its powers and duties as guardian, or so to change the status of its wards as to leave them no longer subject to manifestations of its protection. On the contrary the provisions of the Act leave no doubt that it is an act done by the United States in its capacity as guardian, and that the rights conferred by the Act upon the Indians were so conferred principally because they were wards of the Government. This is shown by the provisions exempting Indians from the payment of the usual fees, and by the provision respecting the form of the trust patent, and the restrictions on alienation.

This being so, we fail to find anything in the Act of June 21, 1906, which transcends the valid powers of the Government over its wards. Passing, for the moment, the question whether the Act of 1906 was intended to apply to Indian homesteaders claiming under the Act of 1884, and assuming, for the purposes of question No. 1, that the word " allottee " was intended to include such Indians, we find that the Act provides:

" That prior to the expiration of the trust period of any Indian allottee to whom a trust or other patent containing restrictions upon alienation has been or shall be issued under any law or treaty the President may in his discretion continue such restrictions on alienation for such period as he may deem best. . . "

This does not involve any question of an attempt to destroy vested rights. The power of the United States, delegated by the Act to the President, is to be exercised prior to the issuance of final patent. It has been held that until final patent be issued no vested right is obtained by the Indian which would support a constitutional objection to the enlargement of the period of the restriction. See *United States* v. *Allen,* 179 Fed. 13, 22, 23; *United States* v. *Hemmer,* 195 Fed. 790.

What has here occurred is that the United States has conferred a privilege upon its wards—as such—and has surrounded its final acquisition with restrictions calculated to secure the advantage of the privilege to those intended to be benefited. Finding that the restrictions authorized at the time of the extension of the privilege will not, in all cases, be long continued enough to secure this result, Congress has authorized the Executive, in his discretion, to continue the restrictions for such period as he may deem best. That this is within the constitutional power of Congress must be considered as concluded by our decisions in *Tiger* v. *Western Investment Co.,* 221 U. S. 286; *Heckman* v. *United States,* 224 U. S. 413; and *Brader* v. *James,* 246 U. S. 88.

The first question must be answered in the affirmative.

But it is suggested, and the District Court has held, that since the language of the Act of June 21, 1906, refers only to Indian *allottees,* it cannot be considered as authorizing the President to continue restrictions on alienation in patents issued to Indian *homesteaders* under the Act of July 4, 1884. In ruling that the 1906 Act did not apply to the trust patent issued to Williams, since he was not an allottee but an Indian homesteader, claiming by virtue of the 1884 Act, which extended the benefits of the homestead laws to the Indians, and not under the General Allotment Act of 1887 or any of its amendments, the District Court relied upon *Seaples* v. *Card,* 246 Fed.

501. In that case a homestead patent was issued to a non-tribal Indian under the Act of July 4, 1884, and, as required by that Act, the patent declared—as does the one here—that the United States held the title in trust for the Indian for a period of 25 years, and would then issue him or his heirs a patent in fee. Before the expiration of this trust period, the Land Department, assuming to act either under the Allotment Act of 1887, or the Act of May 8, 1906, c. 2348, 34 Stat. 182, amendatory thereof, canceled the original trust patent and issued a new patent giving the Indian title in fee simple. The Act of May 8, 1906, provided that the Secretary of the Interior might, in his discretion, whenever he should be satisfied that any "Indian allottee" was competent and capable of managing his or her affairs, cause to be issued to such allottee a patent in fee simple, and the District Court held in that case that this statute gave no authority to the Secretary to cancel the patent issued to Seaples under the 1884 Act, which extended the benefit of the homestead laws to the Indians, but that the 1906 Act applied only to "Indian allottees."

Into the correctness of this decision we do not inquire. It is not, however, controlling here since it turned upon the interpretation of the Act of May 8, 1906, and did not involve any question concerning proper construction of the Act of June 21 of that year, which is presently involved.

Our inquiry is whether Congress intended to include within the meaning of the word "allottees" as used in the latter Act, Indian wards of the United States holding homestead lands by virtue of the Act of 1884. It is argued that Congress did so intend, but that the legislators used only the term "allottee" and did not add "or Indian homesteader" because, while such addition would have prevented the question here involved from arising, it would have added further confusion for the reason that

the language is too broad and would include as well as tribal Indians claiming as wards of the United States under the Act of 1884, Indians claiming as citizens—not as Indian wards—under the general homestead laws. The purpose of the language used is therefore not so plainly apparent as to preclude resort to judicial interpretation. On the contrary, if effect is to be given to the true intent of the Congress, we must avail ourselves of sources of information other than the language of the Act in order to aid us in the disclosure of that intention. There is here no lack of familiar and approved sources from which light upon the proper construction of this statute may be obtained.

It is a familiar rule of statutory construction that great weight is properly to be given to the construction consistently given to a statute by the Executive Department charged with its administration. *United States* v. *Cerecedo Hermanos y Compañia,* 209 U. S. 337; *Robertson* v. *Downing,* 127 U. S. 607; *United States* v. *Healey,* 160 U. S. 136; and such construction is not to be overturned unless clearly wrong, or unless a different construction is plainly required. *United States* v. *Johnston,* 124 U. S. 236, 253; *Hawley* v. *Diller,* 178 U. S. 476, 488. Applying this rule, we find from the case of *Toss Weaxta,* 47 L. D. 574, that it has long been the settled ruling of the Department of the Interior, both under the very statutes here involved and under other statutes enacted by Congress with similar purpose and pursuant to its general plan with respect to Indian allotments and homesteads, that Indian allotments and Indian homesteads are in all essential respects upon the same footing, and that each is equally within the purview of a statute in which the Congress may use only the terms " allottee " and " allotment."

The case of *Toss Weaxta, supra,* was in all essential respects identical with this case, and it involved the same question of law under the same two statutes. Weaxta had

received a trust patent under the Act of 1884, and, at the expiration of the 25-year trust period, he applied to the Commissioner of the General Land Office to issue to him a patent in fee covering his homestead. The Commissioner denied the application, on the ground that the trust period had been, by order of the President, extended, pursuant to the power given the President by the Act of June 21, 1906. Weaxta appealed to the Secretary of the Interior, claiming that an Indian homestead, such as he held, was not an Indian allotment, and that the Act of June 21, 1906, by its terms limits the authority to extend the trust periods to "Indian allotments only." The First Assistant Secretary, in affirming the decision of the Commissioner, found:

"The Department all along has considered Indian homesteads and Indian allotments upon the public lands as being upon practically the same footing, and Congress has recognized the similarity."

He concluded, from a review of laws *in pari materia*, the condition and standing of the Indians, and the obligations of the Government, that both Indian homesteads and Indian allotments must be considered as included within the meaning of the Act of June 21, 1906.

In the case of *Jim Crow*, 32 L. D. 657, 659, the question was whether lands inherited from a deceased Indian *homesteader* came within the provisions of the Act of May 27, 1902, 32 Stat. 245, 275, which Act, by its terms, authorized the sale and conveyance of inherited Indian lands by the heirs of a deceased *allottee*. The Assistant Attorney General held that the Act applied to the heirs of *all* Indian claimants for portions of the public lands, to whom a trust or other patent containing restrictions upon alienation had been issued, regardless of whether the claim of the Indian was initiated under what are known as Indian homestead laws or under Indian allotment laws. This ruling was approved by the Acting Secretary of the Interior, 32 L. D. p. 659. In that ruling the similarity of

the claims of Indians arising out of rights conferred upon them by the General Allotment Act and by the Act of 1884 which gave them homestead entry rights, was pointed out. It was there said:

"The general allotment act, so far as it affects public lands, and the preceding Indian homestead provisions, are so clearly connected that they should be construed *in pari materia* as relating to the same subject-matter. The later allotment act but carries forward the policy of the former enactments to give Indians a right to secure homes upon the public domain.

"Congress has recognized that allotment claims are of the same nature as homestead rights. A fund has been provided for assisting Indian homesteaders and carried upon the books of the Treasury Department under the title 'Homesteads for Indians,' and by the Act of March 3, 1891, 26 Stat. 989, 1007, the Secretary of the Interior was authorized and directed to apply the balance of this fund for the employment of allotting agents 'to assist Indians desiring to take homesteads under section 4,' of the act of February 28 [8], 1887.

"Here Congress characterized claims under the allotment act as homesteads. Claims under the various laws relating to Indian homesteads may with equal propriety be characterized as allotments. In fact the terms mean substantially the same thing so far as the laws in which they are found affect the public lands and so far as the interests of the Indian claimant are concerned.

"This Department has considered Indian homesteads upon practically the same footing as Indian allotments upon the public lands. It is held that the Government is bound to protect the rights of the Indian homesteader during the trust period, that no preference right of entry is obtained by contest against an Indian homestead and a relinquishment of an Indian homestead entry does not become effective until approved by this Department.

(*Doc Jim*, 32 L. D. 291). These rules apply also to Indian allotments. The control, jurisdiction, and obligations of the Department are the same in one case as in the other.

"The objects of the law relating to Indian homesteads are the same as those relating to Indian allotments on the public lands, the status of the Indian claimant is the same under both classes of laws, the duties and obligations of the government are the same. Both the legislative and executive branches of the government have recognized these similarities of purpose in the laws, standing of claimants thereunder, and obligations of the government."

The ruling of the Department of the Interior has been to the same effect under the Act of June 25, 1910, 36 Stat. 855. It was held that that Act empowered the Secretary to determine the heirs of an Indian to whom a homestead trust patent had been issued under the Act of 1884, when the Indian dies before the expiration of the trust, notwithstanding that the Act provides only "that when any Indian to whom an *allotment* of land has been made, or may hereafter be made, dies before the expiration of the trust period," the Secretary may determine his heirs. *Toss Weaxta*, 47 L. D. at 577.

We find that the Indian Homestead Act of July 4, 1884, and the General Allotment Act of February 8, 1887, with its various amendments, constitute part of a single system evidencing a continuous purpose on the part of the Congress. The statutes are *in pari materia*, and must be so construed. It cannot be supposed that Congress, in any part of this legislation, all of which is directed toward the benefit and protection of the Indians, as such, intended to exclude from the beneficent policy which each Act evidences, an Indian claiming under the homestead act, even though the statute uses the term "allottee." If there were any doubt on the question, the silence of Congress in the face of the long continued practice of the

Department of the Interior in construing statutes which refer only to Indian "allottees," or Indian "allotments," as applicable also to Indians claiming under the homestead laws, must be considered as "equivalent to consent to continue the practice until the power was revoked by some subsequent action by Congress." *United States* v. *Midwest Oil Co.*, 236 U. S. 459, 481.

Nothing herein contained must be taken as intimating that the Act of June 21, 1906, has any application to the acquisition of homestead rights under the general homestead laws by persons of the Indian race who have acquired or seek to acquire such rights as citizens rather than as Indian wards of the United States. This distinction is pointed out in *Case of Frank Bergeron*, 30 L. D. 375.

Both questions answered, "Yes."

WABASH RAILWAY COMPANY ET AL. v. BARCLAY ET AL.

AUSTIN v. SAME.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Nos. 37 and 38. Argued December 2, 1929. Decided January 6, 1930.

When the net profits of a corporation out of which a dividend might have been declared for the preferred stock are justifiably applied by the directors to capital improvements, the claim of the stock for that year is gone, if by the terms of the articles of incorporation and the certificates the preferential dividends are not to be cumulative. The fact that there were profits in that year out of which dividends might have been (but were not) declared does not entitle such stock to a correspondingly greater preference over other stock when the profits of a later year are to be divided. P. 203.

30 F. (2d) 260, reversed.

CERTIORARI, 279 U. S. 828, to review a decree of the Circuit Court of Appeals sustaining a bill brought against the Railway Company and its directors by holders of preferred shares to control the apportionment of dividends as between the plaintiffs and shareholders of other classes. The District Court had dismissed the bill.

Mr. Charles E. Hughes, with whom *Messrs. Winslow S. Pierce, F. C. Nicodemus, Jr., Gerald V. Hollins, George R. Leslie, Earle Krapp, Winthrop Taylor, Myron S. Hall, H. W. Cohu, La Motte Cohu, Arnold L. Davis,* and *William Fraser Dickson* were on the brief, for petitioners.

In the absence of language creating a different obligation, the holders of a non-cumulative preferred stock who do not become entitled by appropriate declaration to dividends for a particular fiscal year, have no right to require that dividends for such year be added to the dividends declared for a subsequent year. *Bailey* v. *Railroad Co.,* 17 Wall. 96; *New York, L. E. & W. R. Co.* v. *Nickals,* 119 U. S. 296; *Continental Ins. Co.* v. *United States,* 259 U. S. 156.

That the mere realization of net earnings in non-dividend or partial dividend years should result in the creation of a dividend credit giving cumulative rights *pro tanto* to non-cumulative stock is, we submit, an idea developed recently and directly traceable to a misinterpretation of decisions which do no more than give effect to the special statutory law and policy of the State of New Jersey. *Bassett* v. *Cast Iron Pipe Co.,* 74 N. J. Eq. 668, aff'd 75 N. J. Eq. 539; *Moran and Day* v. *Cast Iron Pipe Co.,* 95 N. J. Eq. 389; *Moran* v. *Cast Iron Pipe Co.,* 96 N. J. Eq. 698; *Day* v. *Cast Iron Pipe Co.,* 96 N. J. Eq. 736. Cf. 23 Columbia L. Rev. 358; 27 *id.* 53; 34 Yale L. J. 657; 11 Va. L. Rev. 553; 74 U. Pa. L. Rev. 605; 14 Cornell L. Q. 341; 38 Yale L. J. 1003; Cook, Corporations, 8th ed., p. 3273; Black's Law Dictionary; *Norwich Water Co.* v. *Southern R. Co.,* 11 Va. L. Reg. (N. S.) 203.

The language of the Preferred A stock contract of Wabash Railway Company definitely excludes a construction under which the investment of earnings in improvements and equipment or working capital in non-dividend or partial dividend years operates as a permanent restraint against the distribution of earnings of subsequent years.

Mr. Joseph S. Clark, with whom *Messrs. William R. Begg* and *Ellis Ames Ballard* were on the brief, for respondents.

The point of difference between cumulative and non-cumulative preferred dividends relates to the right of the stockholders to receive dividends for any year in which the company has failed to earn said dividends, either in whole or in part. Cumulative preferred dividends must be paid before junior dividends, regardless of the year in which they are earned. This is not true of non-cumulative preferred dividends. If they are not earned in any year, or to the extent that they are not earned in any year, the stockholders are not entitled to receive dividends for that year. The deficiency can not be made up out of the surplus earnings of any subsequent year. Non-cumulative preferred dividends, however, to the extent that they are earned year by year, must be paid before junior dividends are paid. This difference between cumulative and non-cumulative dividends is well settled by the authorities. Machen, Corporations, 1908 ed., § 551; Palmer's Company Precedents, Pt. I, 11th ed., p. 812; Palgrave's Dictionary of Political Economy, Vol. I, pp. 606–607; Clark and Marshall, Corporations, § 529–d; *Staples* v. *Eastman Co.,* 65 L. J. Ch. N. S. 682, L. R. 2 Ch. Div. 303. *Day* v. *Cast Iron Pipe Co.,* 95 N. J. Eq. 389. See also, as to definition of "non-cumulative" dividend, *New York, L. E. & W. R. Co.* v. *Nickals.* 119 U. S. 296; *Dent* v. *London Tramways Co.,* L. R. 16 Ch. Div. 344; *Belfast & M. L. R. Co.* v. *Belfast,* 77 Me. 445, s. c. 79 Me. 411; Fletcher's Cyc. of Corporations, vol.

6, § 3754; Berle, Studies in the Law of Corporation Finance, c. V; 23 Columbia L. Rev. 358; 11 Va. L. Rev. 553; 74 U. Pa. L. Rev. 605.

A non-cumulative preferred dividend for any year to the extent that it is earned in that year is no more inchoate and unenforceable than a cumulative dividend. A non-cumulative preferred dividend, to the extent that it is earned in a particular year, is not lost if not declared within the year, but forms the basis for a dividend credit to the extent that it is earned. No junior dividends may be paid out of the earnings of the subsequent year or the general surplus or any other fund until after the Preferred A dividend credit is first satisfied.

The Preferred A dividend is "preferential" but not guaranteed or made a charge upon any earnings, any more than a cumulative dividend is made a charge on earnings. Each fiscal year is a separate accounting period to determine the amount of the non-cumulative dividends which the Preferred A stockholders are entitled to receive in and for that year, but not for any other purpose. The preference is not limited to dividends which may be declared by the Board in the exercise of its ordinary discretion. The dividend right is given by the contract, not by any dividend declaration. The contract provided that the Preferred A stock "is entitled to receive preferential dividends in each year."

By the certificate of incorporation, before any of the preferential B dividends may be paid, the Preferred A stockholders are entitled to receive all of their preferential A dividends, not only those for the current year, but, in addition, those earned in prior years which still remain unpaid. It is true that the stock certificate issued to represent the Preferred A stock uses the word "dividend" instead of the plural, but that was evidently a clerical error.

If the Board divert the earnings of any year, which they might use to pay dividends, to pay for permanent

improvements, the result of such action by the Board is a postponement only in the payment of the dividends and the right of priority in payment still remains intact.

If inequitable results would follow from the adoption of a particular interpretation of the contract, the Court will consider carefully whether there is not some more reasonable interpretation. *Henry* v. *Great Northern R. Co.*, 1 deG. & J. 606.

The following cases were compared and classified: (A) *New York, L. E. & W. R. Co.* v. *Nickals*, 119 U. S. 296; *Continental Ins. Co.* v. *United States*, 259 U. S. 156; *Burk* v. *Ottawa Gas & E. Co.*, 87 Kan. 6; (B) *Wood* v. *Lary*, 47 Hun. 550, s. c. 124 N. Y. 87; *Bassett* v. *Cast Iron Pipe Co.*, 74 N. J. Eq. 668, s. c. 75 N. J. Eq. 539; *Moran* v. *Cast Iron Pipe Co.*, 95 N. J. Eq. 389, s. c. 96 N. J. Eq. 698; *Day* v. *Cast Iron Pipe Co.*, 95 N. J. Eq. 389, s. c. 96 N. J. Eq. 736; *Collins* v. *Portland Elec. Co.*, 7 F. (2d) 221, s. c. 12 F. (2d) 671; (C) *Norwich Water Co.* v. *Southern R. Co.*, 11 Va. L. Reg. (N. S.) 203.

Mr. Justice Holmes delivered the opinion of the Court.

This is a bill by holders of first preferred stock (called Class A) of the Wabash Railway Company, to have it declared that holders of such stock are entitled to receive preferential dividends up to five per cent. for each fiscal year from 1915 to 1926 inclusive to the extent that such dividends were earned in such fiscal years but were unpaid, before any dividends are paid upon other stock; and that the Company may be enjoined from paying dividends upon preferred stock B or common stock unless it shall first have paid such preferential dividends of five per cent. to the extent that the Company has had net earnings available for the payment and that such dividends remain unpaid. The case was heard upon bill and answer. The bill was dismissed by the District Court but the decree

was reversed by the Circuit Court of Appeals, one of the Judges dissenting, 30 F. (2d) 260, and a writ of certiorari was granted by this Court. 279 U. S. 828.

The railway company was organized in 1915 under the laws of Indiana with three classes of capital stock: shares of the par value of $100, of Five Per Cent. Profit Sharing Preferred Stock A; shares of the same par value of Five Per Cent. Convertible Preferred Stock B; and shares of the same par value of Common Stock. At the date of the bill there were 693,330.50 shares of A, 24,211.42 B and 666,977.75 common. From 1915 to 1926 there were net earnings in most of the years but for a number of years no dividend, or less than five per cent., was paid on Class A, while $16,000,000 net earnings that could have been used for the payment were expended upon improvements and additions to the property and equipment of the road. It is not denied that the latter expenditures were proper and were made in good faith, or that the money could not have been applied to dividends consistently with the duties of the Road. The Company now is more prosperous and proposes to pay dividends not only upon A but also on B and the common stock, but the plaintiffs say that it is not entitled to do so until it has paid to them unpaid preferential dividends for prior fiscal years in which it had net earnings that might have been applied to them but were not.

The obligations assumed by the Company appear in its instrument of incorporation and in the certificates of Preferred Stock A in substantially the same words: "The holders of the Five Per Cent. Profit Sharing Preferred Stock A of the Company shall be entitled to receive preferential dividends in each fiscal year up to the amount of five per cent. before any dividends shall be paid upon any other stock of the Company, but such preferential dividends shall be non-cumulative." In the event of a liquidation the holders "shall be entitled to be paid in full out

of the assets of the Company the par amount of their stock and all dividends thereon declared and unpaid before any amount shall be paid out of said assets to the holders of any other stock of the Company." By the plain meaning of the words the holders "are not entitled, of right, to dividends, payable out of the net profits accruing in any particular year, unless the directors of the Company formally declare, or ought to declare, a dividend payable out of such profits"; in the first instance at least a matter for the directors to determine. *New York, Lake Erie & Western R. Co.* v. *Nickals*, 119 U. S. 296, 307.

We believe that it has been the common understanding of lawyers and business men that in the case of non-cumulative stock entitled only to a dividend if declared out of annual profits, if those profits are justifiably applied by the directors to capital improvements and no dividend is declared within the year, the claim for that year is gone and cannot be asserted at a later date. But recently doubts have been raised that seem to have affected the minds of the majority below. We suppose the ground for the doubts is the probability that the directors will be tempted to abuse their power, in the usual case of a corporation controlled by the holders of the common stock. Their interest would lead them to apply earnings to improvement of the capital rather than to make avoidable payments of dividends which they do not share. But whether the remedies available in case of such a breach of duty are adequate or not, and apart from the fact that the control of the Wabash seems to have been in Class A, the class to which the plaintiffs belong, the law, as remarked by the dissenting Judge below, "has long advised them that their rights depend upon the judgment of men subject to just that possible bias."

When a man buys stock instead of bonds he takes a greater risk in the business. No one suggests that he has a right to dividends if there are no net earnings. But the

investment presupposes that the business is to go on, and therefore even if there are net earnings, the holder of stock, preferred as well as common, is entitled to have a dividend declared only out of such part of them as can be applied to dividends consistently with a wise administration of a going concern. When, as was the case here, the dividends in each fiscal year were declared to be non-cumulative and no net income could be so applied within the fiscal year referred to in the certificate, the right for that year was gone. If the right is extended further upon some conception of policy, it is enlarged beyond the meaning of the contract and the common and reasonable understanding of men.

Decree reversed.

THE FARMERS LOAN & TRUST COMPANY, EXECUTOR, *v.* MINNESOTA.

APPEAL FROM THE SUPREME COURT OF MINNESOTA.

No. 26. Argued October 30, 1929.—Decided January 6, 1930.

1. The maxim *mobilia sequuntur personam* applies to negotiable bonds and certificates of indebtedness issued by a State or her municipality, as to ordinary choses in action, and they have situs for taxation—in this case a testamentary transfer tax—at the domicile of their owner. P. 209.
2. When negotiable bonds and certificates of indebtedness issued by a State or her municipality and not used in business in that State, are owned, at the time of his death, by a person domiciled in another State in which they are kept, an attempt of the State in which they were issued to tax their transfer by inheritance is repugnant to the Fourteenth Amendment. *Blackstone* v. *Miller*, 188 U. S. 189, overruled. P. 209.
3. Existing conditions imperatively demand protection of choses in action against multiplied taxation, whether following misapplication of some legal fiction or conflicting theories concerning the sovereign's right to exact contributions. P. 212.
4. Taxation is an intensely practical matter and laws in respect of it should be construed and applied with a view of avoiding, so far as possible, unjust and oppressive consequences. *Id.*

5. The Court can find no sufficient reason for saying that intangible property is not entitled to enjoy an immunity from being taxed at more than one place similar to that accorded to tangible property. P. 212.

6. This case does not present the question whether choses in action that have acquired a situs for taxation other than at the domicile of their owner through having become integral parts of some local business, may be taxed a second time at his domicile. P. 213.

176 Minn. 634, reversed.

APPEAL from a judgment of the Supreme Court of Minnesota upholding an inheritance tax. See also 175 Minn. 310; *id.* 314.

Mr. Cleon Headley, with whom *Messrs. Frank B. Kellogg* and *George W. Morgan* were on the brief, for appellant.

The recent decisions of this Court disclose a definite tendency to draw away from any theoretical conceptions respecting situs of property for taxation purposes which have the anomalous and unjust results of localizing property in more than one place at a time. In *Union Transit Co.* v. *Kentucky,* 199 U. S. 194, the situs of tangible property for property tax purposes was held to be the place where the property is in fact and nowhere else. In *Frick* v. *Pennsylvania,* 268 U. S. 473, the same holding was made with respect to the situs of physical personal property for inheritance tax purposes, though this holding was contrary to an earlier dictum of this Court (*Blackstone* v. *Miller,* 188 U. S. 189) and probably to the then general understanding and practice of state taxing authorities. Reason and justice require that one situs, and not several, be given to all property, whether tangible or intangible.

The case of *Blodgett* v. *Silberman,* 277 U. S. 1, establishes that, because of the deeply rooted maxim *mobilia sequuntur personam,* public securities must still be re-

garded as having a tax situs at the domicile of their owner, no matter where the securities themselves are. In view of this decision, it might indeed be well if the owner's domicile were held to be their single situs irrespective of all other circumstances. But certainly if they are to be given any additional situs it should be only in the State where the securities are in fact kept, since in the business world such securities are universally treated and dealt with as tangible property. We submit that under no proper theory should such property be held to have still a third situs in the State of the debtor, solely by reason of the fact that the bond debtor resides there. In our case, as has been pointed out, the place of the bonds and the domicile of their owner were in the same State, *viz.*, New York. Under such circumstances New York is the single situs of these bonds for either property or inheritance tax purposes, and in the present estate, New York has properly availed itself of its power by taxing their transfer.

Mr. G. A. Youngquist, Attorney General of Minnesota, with whom *Mr. John F. Bonner,* Assistant Attorney General, was on the brief, for appellee.

The tax is not upon property, but upon the right or privilege of transfer granted by the State. *State ex rel. Graff* v. *Probate Court,* 128 Minn. 371; *Maxwell* v. *Bugbee,* 250 U. S. 525; *Knowlton* v. *Moore,* 178 U. S. 41; *United States* v. *Perkins,* 163 U. S. 625; *Mager* v. *Grima,* 8 How. 490.

Minnesota has jurisdiction to tax the transfer of credits owed by persons or corporations domiciled within its borders, or otherwise within its control, regardless of the domicile of the creditor. *Blackstone* v. *Miller,* 188 U. S. 189. See also *Baker* v. *Baker, Eccles & Co.,* 242 U. S. 394; *Frick* v. *Pennsylvania,* 268 U. S. 491; *Wyman* v. *Halstead,* 109 U. S. 654; *Chicago R. I. & P. R. Co.* v. *Sturm,*

174 U. S. 710; *Liverpool & L. & G. Ins. Co.* v. *Board of Assessors,* 221 U. S. 346. Distinguishing *Rhode Island Tr. Co.* v. *Doughton,* 270 U. S. 69.

The cases of *Blackstone* v. *Miller* and *Blodgett* v. *Silberman* are decisive of the case at bar. In the first it was held that the transfer of a bank deposit and a simple debt was taxable by the State of the debtor's domicile because they were intangible property, choses in action. In the second it was held that debts evidenced by public bonds are intangible property, choses in action. In combination they hold that the transfer of debts evidenced by public bonds is taxable at the debtor's domicile.

One tax is not invalidated by the imposition of another upon the same transfer. *Blackstone* v. *Miller,* 188 U. S. 189. But if intangibles were to have a single situs for the purpose of a property tax or of a transfer tax, or only one additional to that at the domicile of the owner, that situs should be the domicile of the debtor. 31 Harv. L. Rev. 930, 931.

Payment of the bonds is provided for and can be enforced only through the laws of Minnesota.

Registration and place of payment are immaterial on question of situs. *Wyman* v. *Halstead,* 109 U. S. 654.

Other States support appellee's position. *Chaffin* v. *Johnson,* 200 Ia. 89; *In re Rogers Estate,* 149 Mich. 305.

The State of the debtor protects the debt, compels its payment, and permits its transfer. Every canon of logic and of justice supports the policy of that State to exact tribute from testator or beneficiary upon the transfer as a single succession. The principle should not be obscured by theoretical discussions of technical situs. To paraphrase the language in *Louisville & N. R. Co.* v. *Barber Asphalt Paving Co.,* 197 U. S. 430, and *Wheeler* v. *Sohmer,* 233 U. S. 434, it is important that the Court "avoid extracting from the very general language of the Fourteenth Amendment a system of delusive exactness in

order to destroy methods of taxation," and that it exercise "caution in cutting down the power of the States" on the strength of that Amendment.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

Henry R. Taylor, while domiciled and residing in New York, died testate, December 4, 1925. He had long owned and kept within that State negotiable bonds and certificates of indebtedness issued by the State of Minnesota and the Cities of Minneapolis and St. Paul, worth above $300,000. Some of these were registered, others were payable to bearer. None had any connection with business carried on by or for the decedent in Minnesota. All passed under his will which was probated in New York. There also his estate was administered and a tax exacted upon the testamentary transfer.

Minnesota assessed an inheritance tax upon the same transfer. Her Supreme Court approved this and upheld the validity of the authorizing statute. The executor—appellant—claims that, so construed and applied, that enactment conflicts with the Fourteenth Amendment.

When this cause first came before the Supreme Court of Minnesota it held negotiable public obligations were something more than mere evidences of debt and, like tangibles, taxable only at the place where found, regardless of the owner's domicile. It accordingly denied the power of that State to tax the testamentary transfer. After *Blodgett* v. *Silberman*, 277 U. S. 1, upon a rehearing, considering that cause along with *Blackstone* v. *Miller*, 188 U. S. 189, it felt obliged to treat the bonds and certificates like ordinary choses in action and to uphold the assessment.

Registration of certain of the bonds we regard as an immaterial circumstance. So did the court below. Counsel do not maintain otherwise.

Under *Blodgett* v. *Silberman* the obligations here involved were rightly regarded as if ordinary choses in action. The maxim *mobilia sequuntur personam* applied and gave them situs for taxation in New York—the owner's domicile. The testamentary transfer was properly taxed there. This is not controverted.

But it is said the obligations were debts of Minnesota and her corporations, subject to her control; that her laws gave them validity, protected them and provided means for enforcing payment. Accordingly, counsel argue that they had situs for taxation purposes in that State and maintain the validity of the challenged assessment.

Blackstone v. *Miller, supra,* and certain approving opinions, lend support to the doctrine that ordinarily choses in action are subject to taxation both at the debtor's domicile and at the domicile of the creditor; that two States may tax on different and more or less inconsistent principles the same testamentary transfer of such property without conflict with the Fourteenth Amendment. The inevitable tendency of that view is to disturb good relations among the States and produce the kind of discontent expected to subside after establishment of the Union. The Federalist, No. VII. The practical effect of it has been bad; perhaps two-thirds of the States have endeavored to avoid the evil by resort to reciprocal exemption laws. It has been stoutly assailed on principle. Having reconsidered the supporting arguments in the light of our more recent opinions, we are compelled to declare it untenable. *Blackstone* v. *Miller* no longer can be regarded as a correct exposition of existing law; and to prevent misunderstanding it is definitely overruled.

Four different views concerning the situs for taxation of negotiable public obligations have been advanced. One fixes this at the domicile of the owner; another at the debtor's domicile; a third at the place where the in-

struments are found—physically present; and the fourth within the jurisdiction where the owner has caused them to become integral parts of a localized business. If each State can adopt any one of these and tax accordingly, obviously, the same bonds may be declared present for taxation in two, or three, or four places at the same moment. Such a startling possibility suggests a wrong premise.

In this Court the presently approved doctrine is that no State may tax anything not within her jurisdiction without violating the Fourteenth Amendment. *State Tax on Foreign Held Bonds,* 15 Wall. 300; *Union Refrig. Transit Co.* v. *Kentucky,* 199 U. S. 194; *Safe Deposit & Trust Co.* v. *Virginia, ante,* p. 83. Also no State can tax the testamentary transfer of property wholly beyond her power, *Rhode Island Trust Co.* v. *Doughton,* 270 U. S. 69, or impose death duties reckoned upon the value of tangibles permanently located outside her limits. *Frick* v. *Pennsylvania,* 268 U. S. 473. These principles became definitely settled subsequent to *Blackstone* v. *Miller* and are out of harmony with the reasoning advanced to support the conclusion there announced.

At this time it cannot be assumed that tangible chattels permanently located within another State may be treated as part of the universal succession and taken into account when estimating the succession tax laid at the decedent's domicile. *Frick* v. *Pennsylvania* is to the contrary.

Nor is it permissible broadly to say that notwithstanding the Fourteenth Amendment two States have power to tax the same personalty on different and inconsistent principles or that a State always may tax according to the fiction that in successions after death *mobilia sequuntur personam* and domicile govern the whole. *Union Refrig. Transit Co.* v. *Kentucky, supra, Rhode Island Trust Co.* v. *Doughton, supra,* and *Safe Deposit & Trust Co.* v. *Virginia, supra,* stand in opposition.

Southern Pacific Co. v. *Kentucky,* 222 U. S. 63, indicates plainly enough that the right of one State to tax may depend somewhat upon the power of another so to do. And *Coe* v. *Errol,* 116 U. S. 517, 524, though frequently cited to support the general affirmation that nothing in the Fourteenth Amendment prohibits double taxation, does not go so far. It affirmed the rather obvious proposition that the mere fact of taxation of tangibles by one State is not enough to exclude the right of another to tax them.

"If the owner of personal property within a State resides in another State which taxes him for that property as part of his general estate attached to his person, this action of the latter State does not in the least affect the right of the State in which the property is situated to tax it also. . . . The fact, therefore, that the owners of the logs in question were taxed for their value in Maine as a part of their general stock in trade, if such fact were proved, could have no influence in the decision of the case and may be laid out of view."

If Maine undertook to tax logs permanently located in another State, she transcended her legitimate powers. *Union Refrig. Transit Co.* v. *Kentucky, supra.* Of course, such action could not affect New Hampshire's rights in respect of property localized within her limits.

While debts have no actual territorial situs we have ruled that a State may properly apply the rule *mobilia sequuntur personam* and treat them as localized at the creditor's domicile for taxation purposes. Tangibles with permanent situs therein, and their testamentary transfer, may be taxed only by the State where they are found. And, we think, the general reasons declared sufficient to inhibit taxation of them by two States apply under present circumstances with no less force to intangibles with taxable situs imposed by due application of the legal fiction. Primitive conditions have passed; business is

now transacted on a national scale. A very large part of the country's wealth is invested in negotiable securities whose protection against discrimination, unjust and oppressive taxation, is matter of the greatest moment. Twenty-four years ago *Union Refrig. Transit Co.* v. *Kentucky, supra,* declared—" . . . in view of the enormous increase of such property [tangible personalty] since the introduction of railways and the growth of manufactures, the tendency has been in recent years to treat it as having a *situs* of its own for the purpose of taxation, and correlatively to exempt [it] at the domicile of the owner." And, certainly, existing conditions no less imperatively demand protection of choses in action against multiplied taxation whether following misapplication of some legal fiction or conflicting theories concerning the sovereign's right to exact contributions. For many years the trend of decisions here has been in that direction.

Taxation is an intensely practical matter and laws in respect of it should be construed and applied with a view of avoiding, so far as possible, unjust and oppressive consequences. We have determined that in general intangibles may be properly taxed at the domicile of their owner and we can find no sufficient reason for saying that they are not entitled to enjoy an immunity against taxation at more than one place similar to that accorded to tangibles. The difference between the two things, although obvious enough, seems insufficient to justify the harsh and oppressive discrimination against intangibles contended for on behalf of Minnesota.

Railroad Company v. *Pennsylvania*—"*State Tax on Foreign Held Bonds Case*"—15 Wall. 300, 320, distinctly held that the State was without power to tax the owner of bonds of a domestic railroad corporation made and payable outside her limits when issued to and held by citizens and residents of another State. Through Mr. Justice Field the Court there said—

" But debts owing by corporations, like debts owing by individuals, are not property of the debtors in any sense; they are obligations of the debtors, and only possess value in the hands of the creditors. With them they are property, and in their hands they may be taxed. To call debts property of the debtors is simply to misuse terms. All the property there can be in the nature of things in debts of corporations, belongs to the creditors, to whom they are payable, and follows their domicile, wherever that may be. Their debts can have no locality separate from the parties to whom they are due. This principle might be stated in many different ways, and supported by citations from numerous adjudications, but no number of authorities, and no forms of expression could add anything to its obvious truth, which is recognized upon its simple statement."

If the situs of the bonds for taxation had been at the debtor's domicile—Pennsylvania—the challenged effort to tax could not have interfered unduly with the debtor's contract to pay interest.

New Orleans v. *Stempel,* 175 U. S. 309, *Bristol* v. *Washington County,* 177 U. S. 133, *Liverpool & L. & G. Ins. Co.* v. *Orleans Assessors,* 221 U. S. 346, recognize the principle that choses in action may acquire a situs for taxation other than at the domicile of their owner if they have become integral parts of some local business. The present record gives no occasion for us to inquire whether such securities can be taxed a second time at the owner's domicile.

The bonds and certificates of the decedent had acquired permanent situs for taxation in New York; their testamentary transfer was properly taxable there but not in Minnesota.

The judgment appealed from must be reversed. The cause will be remanded for further proceedings not inconsistent with this opinion.

Reversed.

MR. JUSTICE STONE, concurring.

I concur in the result. Whether or not control over a debt at the domicile of the debtor gives jurisdiction to tax the debt, *Liverpool & L. & G. Ins. Co.* v. *Board of Assessors,* 221 U. S. 346, 354, we are not here concerned with a property tax, but with an excise or privilege tax imposed on the transfer of an intangible, see *Stebbins* v. *Riley,* 268 U. S. 137; *Saltonstall* v. *Saltonstall,* 276 U. S. 260, and to sustain a privilege tax the privilege must be enjoyed in the state imposing it. *Provident Savings Society* v. *Kentucky,* 239 U. S. 103. It is enough, I think, to uphold the present decision that the transfer was effected in New York by one domiciled there and is controlled by its law.

Even though the contract transferred was called into existence by the laws of Minnesota, its obligation cannot be constitutionally impaired or withdrawn from the protection which those laws gave it at its inception. See *Provident Savings Society* v. *Kentucky,* 239 U. S. 103, 113, 144; *Bedford* v. *Eastern Building & Loan Association,* 181 U. S. 227. And while the creditor may rely on Minnesota law to enforce the debt, that may be equally true of the law of any other state where the debtor or his property may be found. So far as the transfer, as distinguished from the contract itself, is concerned, it is New York law and not that of Minnesota which, by generally accepted rules, is applied there and receives recognition elsewhere. See *Bullen* v. *Wisconsin,* 240 U. S. 625, 631; *Russell* v. *Grigsby,* 168 Fed. 577; *Lee* v. *Abdy,* 17 Q. B. Div. 309; *Miller* v. *Campbell,* 140 N. Y. 457, 460; *Spencer* v. *Myers,* 150 N. Y. 269. Once the bonds had passed beyond the state and were acquired by an owner domiciled elsewhere, the law of Minnesota neither protected, nor could it withhold the power of transfer or prescribe its terms.

In the light of these considerations, granting that the continued existence of the contract rested in part on the law of Minnesota, the relation of that law to the transfer in New York, both in point of theory and in every practical aspect, appears to me to be too attenuated to constitute any reasonable basis for deeming the transfer to be within the taxing jurisdiction of Minnesota.

As the present is not a tax on the debt, but only on the transfer of it, neither the analogies drawn from the law of property taxes nor the attempt to solve the present problem by ascribing to a legal relationship unconnected with any physical thing, a fictitious *situs*, can, I think, carry us very far toward a solution. Nor does it seem that the invocation of the Fourteenth Amendment to relieve from the burdens of double taxation, as such, promises more.

Hitherto the fact that taxation is "double" has not been deemed to affect its constitutionality and there are, I think, too many situations in which a single economic interest may have such legal relationships with different taxing jurisdictions as to justify its taxation in both, to admit of our laying down any constitutional principle broadly prohibiting taxation merely because it is double, at least until that characterization is more precisely defined.

It seems to me to be unnecessary and undesirable to lay down any doctrine whose extent and content are so dubious. Whether it is far reaching enough to overturn those cases which, in circumstances differing somewhat from the present, have been regarded as permitting taxation in more than one state, reaching the same economic interest, is so uncertain as to suggest doubts of its trustworthiness and utility as a principle of judicial decision. See *Wheeler* v. *Sohmer,* 233 U. S. 434, and *Blodgett* v. *Silberman,* 277 U. S. 1; *Scottish Union & National*

Ins. Co. v. *Bowland,* 196 U. S. 611, 620; *Rogers* v. *Hennepin County,* 240 U. S. 184, 191; *New Orleans* v. *Stempel,* 175 U. S. 309; *Metropolitan Life Ins. Co.* v. *New Orleans,* 205 U. S. 395; *Bristol* v. *Washington County,* 177 U. S. 133; *Kirtland* v. *Hotchkiss,* 100 U. S. 491, and *Savings & Loan Society* v. *Multnomah County,* 169 U. S. 421; *Union Refrig. Transit Co.* v. *Kentucky,* 199 U. S. 194, 205; *Tappan* v. *Merchants National Bank,* 19 Wall. 490, 499; *Corry* v. *Baltimore,* 196 U. S. 466, and *Hawley* v. *Malden,* 232 U. S. 1, 12; *Blackstone* v. *Miller,* 188 U. S. 189 (so far as it relates to the transfer tax on a bank account in the state of the bank), and *Fidelity & Columbia Trust Co.* v. *Louisville,* 245 U. S. 54, 58; *Bullen* v. *Wisconsin,* 240 U. S. 625, 631.

MR. JUSTICE HOLMES, dissenting.

This is a proceeding for the determination of a tax alleged to be due to the State of Minnesota but objected to by the appellant as contrary to the Fourteenth Amendment of the Constitution of the United States. The tax is imposed in respect of the transfer by will of bonds and certificates of indebtedness of the State of Minnesota and bonds of two cities of that State. The testator died domiciled in New York and the bonds were there at the time of his death. The Supreme Court of the State upheld the tax, *In re Estate of Taylor,* 176 Minn. 634, and the executor appeals.

It is not disputed that the transfer was taxable in New York, but there is no constitutional objection to the same transaction being taxed by two States, if the laws of both have to be invoked in order to give it effect. It may be assumed that the transfer considered by itself alone depends on the law of New York, but if the law of Minnesota is necessary to the existence of anything beyond a piece of paper to be transferred then Minnesota may demand payment for a privilege that could not exist without its help. It seems to me that the law of Minnesota is a

present force necessary to the existence of the obligation, and that therefore, however contrary it may be to enlightened policy, the tax is good.

No one would doubt that the law of Minnesota was necessary to call the obligation into existence. Other States do not attempt to determine the legal consequences of acts done outside of their jurisdiction, and therefore whether certain acts done in Minnesota constitute a contract or not depends on the law of Minnesota alone. I think the same thing is true of the continuance of the obligation to the present time. It seems to me that it is the law of Minnesota alone that keeps the debt alive. Obviously at the beginning that law could have provided that the debt should be extinguished by the death of the creditor or by such other event as that law might point out. It gave the debt its duration. The continued operation of that law keeps the debt alive. Not to go too far into the field of speculation but confining the discussion to cities of the State and the State itself, the continued existence of the cities and the readiness of the State to keep its promises depend upon the will of the State. If there were no Constitution the State might abolish the debt by its fiat. The only effect of the Constitution is that the law that originally gave the bonds continuance remains in force unchanged. But it is still the law of that State and no other. When such obligations are enforced by suit in another State it is on the footing of recognition, not of creation. *Deutsche Bank Filiale Nurnberg* v. *Humphrey,* 272 U. S. 517, 519. Another State, if it is civilized, does not undertake to say to the debtor now that we have caught you we will force an obligation upon you whether you still are bound by the law of your own State or not. I believe this to be the vital point. Unless I am wrong the debt, wherever enforced, is enforced only because it is recognized as such by the law that created it and keeps it still a debt. No doubt sometimes obligations are enforced elsewhere when

the statute of limitations has run at home. But such decisions when defencible stand on the ground that the limitation is only procedural and does not extinguish the duty. If the statute extinguishes the debt by lapse of time no foreign jurisdiction that intelligently understood its function would attempt to make the debtor pay.

I will not repeat what I said the other day in *Safe Deposit & Trust Co.* v. *Virginia, ante,* p. 83, concerning the attempt to draw conclusions from the supposed *situs* of a debt. The right to tax exists in this case because the party needs the help of Minnesota to acquire a right, and that State can demand a *quid pro quo* in return. *Southern Pacific Co.* v. *Kentucky,* 222 U. S. 63, 68. *Union Refrigerator Transit Co.* v. *Kentucky,* 199 U. S. 194, 206.

I do not dwell on the practical necessity of resorting to the State in order to secure payment of state or municipal bonds. Even if the creditor had a complete and adequate remedy elsewhere, I still should think that a correct decision of the case must rest on whether I am right or not about the theoretical dependence of the continued existence of the bonds upon Minnesota law.

Blackstone v. *Miller,* 188 U. S. 189, supports my conclusions and I do not think that it should be overruled. A good deal has to be read into the Fourteenth Amendment to give it any bearing upon this case. The Amendment does not condemn everything that we may think undesirable on economic or social grounds.

MR. JUSTICE BRANDEIS agrees with this opinion.

THE CORN EXCHANGE BANK *v.* COLER, COMMISSIONER OF PUBLIC WELFARE.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 36. Argued November 27, 1929.—Decided January 6, 1930.

In view of its ancient origin, the New York procedure (Code, Cr. Pro., §§ 921–925) whereby the property of an absconding husband

may be taken over and applied to the maintenance of his wife or children through judicial proceedings, can not be held repugnant to the due process clause of the Fourteenth Amendment, with respect to the husband or to a bank in which his money was deposited, although no notice to the husband, either actual or constructive, is provided by the statute. *Ownbey* v. *Morgan*, 256 U. S. 94. P. 222.

250 N. Y. 136, affirmed.

APPEAL from a judgment of the Court of Appeals of New York which affirmed the Appellate Division of the Supreme Court in sustaining a proceeding by Coler, as Commissioner of Public Welfare of the City of New York, to reduce to his possession a deposit held by the bank, for the purpose of applying it to the maintenance of the wife and child of the depositor, who had absconded. See also, 132 Misc. Rep. 449.

Mr. Spotswood D. Bowers, with whom *Messrs. Henry M. Carpenter* and *Stewart W. Bowers* were on the brief, for appellant.

A statute which takes a person's property and turns it over to another, no matter under what guise it may be done, is, in the absence of a provision requiring notice to the owner of the property, unconstitutional. *Security Trust Co.* v. *Lexington*, 203 U. S. 323; *Stuart* v. *Palmer*, 74 N. Y. 183; *Windsor* v. *McVeigh*, 93 U. S. 273; *Twining* v. *New Jersey*, 211 U. S. 78; *Roller* v. *Holly*, 176 U. S. 398; *Ochoa* v. *Hernandez*, 230 U. S. 139; *Wuchter* v. *Pizzutti*, 276 U. S. 13; *McDonald* v. *Mabee*, 243 U. S. 90; *Kaukauna W. P. Co.* v. *Green Bay Co.*, 142 U. S. 254.

There is no similarity between the statute in question and warrants of attachment or sequestration proceedings in matrimonial actions, where notice following the seizure is provided for. *Matthews* v. *Matthews*, 240 N. Y. 28.

The mere so-called seizure of the debt due the alleged absconder was not sufficient notice to satisfy the constitutional requirement of due notice. *Miller* v. *Lautenberg*,

239 N. Y. 142; *Pennoyer* v. *Neff*, 95 U. S. 714; *Faling* v. *Multnomah County*, 46 Ore. 460; *Ackerman* v. *Ackerman*, 55 N. J. L. 422.

The antiquity of the statute is of no importance except in cases of ambiguity, when it may be considered in determining the proper construction of the statute. Where the language of the statute is clear and precise and the meaning evident, the statute will be declared unconstitutional no matter how long it has been in existence. *Fairbank* v. *United States*, 181 U. S. 283; *United States* v. *Graham*, 110 U. S. 219; *United States* v. *Tanner*, 147 U. S. 661.

Mr. J. Joseph Lilly, with whom *Messrs. Arthur J. W. Hilly* and *Martin H. Murphy* were on the brief, for appellee.

The appellant's depositor was not deprived of his property without due process of law. *Windsor* v. *McVeigh*, 93 U. S. 274; *The Mary*, 9 Cr. 126; *Miller* v. *Lautenberg*, 239 N. Y. 132; *Zimmerman Coal Co.* v. *Coal Trading Ass'n*, 30 F. (2d) 933; *The Ann*, 8 Fed. 923.

The statutes did not deny or attempt to deny the depositor a hearing (see *Zimmerman Coal Co.* v. *Coal Trading Ass'n*, 30 F. (2d) 933), or refuse him the right to appear (*Windsor* v. *McVeigh*, 93 U. S. 274). They did not even place a limit of time (See Code of Criminal Procedure § 924) upon his constitutionally protected right to appear and defend in person and with counsel, and upon proper proof or assurance, to receive back the property which was seized for the purpose of applying it to the maintenance of the child and wife he had abandoned.

The seized property did little more than stand as bail (*In re Mitchell*, 278 Fed. 707; *Bryan* v. *Bernheimer*, 181 U. S. 188) for satisfaction of the continuing duty to support and maintain the wife and child and keep them from becoming charges upon the public revenues.

There is nothing in the Constitution to prevent the States from defending their revenues in situations like this.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

The Commissioner of Public Welfare complained to the Domestic Relations Court that, while residing with them in New York City, Raffaele De Stefano abandoned his wife and infant child and absconded from the State, leaving them without means and likely, unless relieved, to become public charges. Upon the wife's supporting affidavit two magistrates of the court issued a warrant authorizing seizure of all the absconding husband's right, title and interest in his deposit with appellant Bank and directing return to the County Court. After service and demand the Bank refused to pay. Thereupon, the Commissioner by complaint in the City Court sought to reduce the fund to his possession. The Bank moved for judgment upon the ground that the statute—basis of the warrant—failed to provide for notice, either actual or constructive, to the absconder, and could not be enforced without denying the due process of law guaranteed by both State and Federal constitutions. It prevailed in the City Court. The Appellate Term reversed that action and directed judgment for the Commissioner, and this was approved by the Court of Appeals.

Sections 921, 922, 923, 924, 925, New York Code of Criminal Procedure, under which the original warrant issued, provide in substance:—That the Commissioner of Public Welfare may apply to two magistrates for a warrant to seize the property of an absconding husband or father leaving wife or child likely to become charges on the public; that upon due proof of the facts, the warrant may be issued; that the officer receiving it may seize the

property wherever found within his county; and shall be vested with all the rights and title thereto which the person absconding then had; that return of all proceedings under the warrant shall be made to the next term of the County Court; that thereupon that court, upon inquiring into the circumstances of the case, may confirm or discharge the warrant and seizure; that in the event of confirmation the court shall from time to time direct what part of the property shall be sold, and how the proceeds shall be applied to the maintenance of spouse or children; and on the other hand that if the party against whom the warrant has issued shall return and support the spouse or children so abandoned, or give satisfactory security for such support, then the warrant shall be discharged, and the property restored.

The Court of Appeals ruled that jurisdiction of the magistrates to issue the warrant and of the County Court to enter a confirmatory judgment depend upon existence of the relation sought to be regulated; that "the victim of the seizure may nullify the whole proceeding, including any adjudication attempted in his absence, if there is lacking the jurisdictional relation which is the basis of his duty." Thus limited, it upheld the enactment as a proper regulation of family relation and affirmed the judgment in the Commissioner's favor for the amount claimed in his complaint.

The challenged procedure is an ancient one. In 1718 the Parliament of England enacted a statute reciting a like ill and prescribing like remedy. The New York Colonial Legislature passed a substantially similar law in 1773; the State Legislature in 1784, and again in 1788. This passed into the Revised Laws of 1813; afterwards, broadened to subject choses in action to seizure, into the Revised Statutes of 1829. Without material change it has continued in effect, and has been enforced unquestioned until the present action.

In *Ownbey* v. *Morgan,* 256 U. S. 94, 112, we upheld certain rather harsh legislation of the State of Delaware modeled on the custom of London and dating back to Colonial days. Its validity, challenged because of alleged conflict with the due process clause of the Fourteenth Amendment, was sustained because of the origin and antiquity of the provisions.

"However desirable it is that the old forms of procedure be improved with the progress of time, it cannot rightly be said that the Fourteenth Amendment furnishes a universal and self-executing remedy. Its function is negative, not affirmative, and it carries no mandate for particular measures of reform. For instance, it does not constrain the States to accept particular modern doctrines of equity, or adopt a combined system of law and equity procedure, or dispense with all necessity for form and method in pleading, or give untrammelled liberty to make amendments. Neither does it, as we think, require a State to relieve the hardship of an ancient and familiar method of procedure by dispensing with the exaction of special security from an appearing defendant in foreign attachment."

Following the reasoning of that cause we think the statute here under consideration cannot be said to offend the Federal Constitution.

That the appellant Bank under some remote possibility may be called upon to pay a second time is true; but when voluntarily contracting with the depositor it knew this and accepted the consequent responsibility. Under the approved practice there was abundant opportunity to make defense—to require proof of all essential facts. At all events, its position is not materially worse than that of a debtor who must pay one who holds letters testamentary issued upon proof of death, though in truth the creditor may be alive with power to repudiate the appointment. See *Scott* v. *McNeal,* 154 U. S. 34.

Judgment affirmed.

KOTHE, TRUSTEE, *v.* R. C. TAYLOR TRUST.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

No. 48. Argued December 4, 1929.—Decided January 6, 1930.

1. A stipulation in a contract to pay a fixed sum as liquidated damages in case the contract be broken, will not be enforced if the amount fixed is plainly without reasonable relation to any probable damages from a breach. P. 226.
2. In a lease for two years the lessee agreed that the mere filing of a petition in bankruptcy against him should be deemed a breach and that thereupon, *ipso facto*, the lease should terminate and the lessor become entitled to re-enter and also to recover damages equal to the full amount of the rent reserved for the remainder of the term. The lessee became bankrupt, and the lessor claimed $5,000, equal to 15 months' rent. *Held*, that the claim should not be enforced against the trustee in bankruptcy, as, on the case submitted, the provision in the lease must be regarded as one for a penalty apparently designed to insure to the lessor preferential treatment in the event of the lessee's bankruptcy. P. 226.
3. Agreements tending to defeat the purpose of the Bankruptcy Act to bring about an equitable distribution of the bankrupt's estate among creditors holding just demands based upon adequate consideration must be regarded with disfavor. P. 227.

30 F. (2d) 77, reversed.

CERTIORARI, 279 U. S. 830, to review a judgment of the Circuit Court of Appeals reversing the District Court and upholding a claim against Kothe, as trustee in bankruptcy.

Mr. Frank H. Pardee for petitioner.

Mr. George S. Taft, with whom *Mr. T. Hovey Gage* was on the brief, for respondent.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

April 20th, 1927, respondent—the R. C. Taylor Trust—leased to one Turkel certain real estate, reserving rent at the rate of $4,000 per annum. The meager record before

us does not affirmatively show the length of the term, but we accept the statement by counsel for both sides that it was two years. The lease contained the following provision—

"The filing of any petition in bankruptcy . . . by or against the Lessee shall be deemed to constitute a breach of this lease, and thereupon, ipso facto and without entry or other action by the Lessor, this lease shall become and be terminated; and, notwithstanding any other provisions of this lease the Lessor shall forthwith upon such termination be entitled to recover damages for such breach in an amount equal to the amount of the rent reserved in this lease for the residue of the term hereof."

Turkel having been adjudged bankrupt the lessor filed proof of debt for $5,000 demanded as "damages for breach of lease . . . that being the same as the amount of rent reserved in the lease from February 15, 1928 to May 15, 1929, the end of the term."

The referee disallowed the claim "for the reason that the proof is based on damages for the amount of rent running from the date of the filing of the petition to the end of the term of the lease, no part of such claim being for any rent which had accrued at the time of the filing of said bankruptcy petition." The District Court affirmed his action; but the court below held the claim valid and allowable under § 63 (a) 4 of the Bankruptcy Act, 1898, 30 Stat. 563 (U. S. C., Title 11, c. 7, § 103).

The Trustee, petitioner here, maintains that the quoted provision of the lease imposed a penalty and did not express any lawful purpose to fix the liquidated damages which might follow failure to perform. On the other hand, the respondent insists that in view of the length of the term the agreement must be regarded as one for liquidated damages and therefore unobjectionable.

Sun Printing & Publishing Ass'n v. *Moore,* 183 U. S. 642 and *United States* v. *Bethlehem Steel Co.,* 205 U. S.

105, 119, point out principles applicable to enforcement of contracts providing for payment of definite sums upon failure to perform. The courts are "strongly inclined to allow parties to make their own contracts, and to carry out their intentions, even when it would result in the recovery of an amount stated as liquidated damages, upon proof of the violation of the contract, and without proof of the damages actually sustained. . . . The question always is, what did the parties intend by the language used? When such intention is ascertained it is ordinarily the duty of the court to carry it out." And see *United States* v. *United Engineering Co.*, 234 U. S. 236, 241: "Such contracts for liquidated damages when reasonable in their character are not to be regarded as penalties and may be enforced between the parties." But agreements to pay fixed sums plainly without reasonable relation to any probable damage which may follow a breach will not be enforced. This circumstance tends to negative any notion that the parties really meant to provide a measure of compensation—"to treat the sum named as estimated and ascertained damages."

Here, we find the lessee in a lease for two years agreeing that the mere filing of a petition in bankruptcy against him shall be deemed a breach and thereupon, *ipso facto,* it shall be terminated and the lessor shall become entitled to re-enter, also to recover damages equal to the full amount of the rent reserved for the remainder of the term. The amount thus stipulated is so disproportionate to any damage reasonably to be anticipated in the circumstances disclosed that we must hold the provision is for an unenforceable penalty. The parties were consciously undertaking to contract for payment to be made out of the assets of a bankrupt estate—not for something which the lessee personally would be required to discharge. He, therefore, had little, if any, immediate concern with the amount of the claim to be presented; most probably, that

would affect only those entitled to share in the proceeds of property beyond his control.

The broad purpose of the Bankruptcy Act is to bring about an equitable distribution of the bankrupt's estate among creditors holding just demands based upon adequate consideration. Any agreement which tends to defeat that beneficent design must be regarded with disfavor. Considering the time which the lease here involved had to run, nothing else appearing, it seems plain enough that the real design of the challenged provision was to insure to the lessor preferential treatment in the event of bankruptcy. The record discloses no circumstance sufficient to support a contrary view. If the term were much shorter, or there were facts tending to disclose a proper purpose, the argument in favor of the lessor would be more persuasive.

The decree of the court below must be reversed. The judgment of the District Court will be affirmed and the cause remanded there for further appropriate proceedings.

Reversed.

REINECKE, COLLECTOR OF INTERNAL REVENUE, *v.* SPALDING.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 59. Argued December 6, 1929.—Decided January 6, 1930.

1. One who seeks to recover money exacted as income taxes upon the ground that a deduction as claimed was illegally disallowed by the Commissioner of Internal Revenue, has the burden of showing that he was entitled to such deduction. P. 232.
2. Under § 214 (a) of the Revenue Act of 1918, and likewise (*semble*) under § 5 (a) of the Revenue Act of 1916, the deduction for depletion in computing the net income derived during a tax year from a mine, by its lessor, under a long lease made prior to March 1, 1913, reserving a fixed royalty per ton of ore extracted by the lessee, is to be determined on the basis of the fair market value

on that date of the lessor's interest in the mine as an entity, i. e., of his right to receive the royalties stipulated and to regain possession when the lease should terminate. P. 233.

3. The market value per ton on March 1, 1913, is not equivalent to the sum which, with simple interest from that date, will equal the royalty when the ore is actually extracted and the royalty is payable. P. 233.

30 F. (2d) 369, reversed.

CERTIORARI, 279 U. S. 831, to review a judgment of the Circuit Court of Appeals which affirmed a recovery in an action against the Collector for money paid under protest as income taxes.

Mr. Claude R. Branch, with whom *Solicitor General Hughes, Assistant Attorney General Youngquist,* and *Messrs. Sewall Key* and *J. Louis Monarch,* Special Assistants to the Attorney General, were on the brief, for petitioner.

Mr. John M. Zane, with whom *Mr. Henry A. Gardner* was on the brief, for respondent.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

The respondent owns a one-sixth interest in several leases executed 1901, 1902, 1903, and 1905, which authorize the lessee to take iron ore from certain Minnesota lands for twenty-five, forty-five and fifty years from their respective dates. These leases require payments quarterly of 25 cents royalty per ton upon all ore extracted; provide for minimum annual production and termination under specified circumstances.

During the year 1917 she received out of such royalties $260,072.30; during 1918, $219,940.43. For 1917 she was allowed $99,561.20 as depletion; for 1918, $84,979.55. Income tax was assessed against her upon the balances and payment exacted. Thereafter she unsuccessfully claimed refunds because the sums allowed for depletion were insufficient. The present suit followed.

The Revenue Act of 1918, c. 18, 40 Stat. 1057, 1066, 1067, (approved February 24, 1919) provides—

"Sec. 214. (a) That in computing net income there shall be allowed as deductions:

* * * * *

"(10) In the case of mines, oil and gas wells, other natural deposits, and timber, a reasonable allowance for depletion and for depreciation of improvements, according to the peculiar conditions in each case, based upon cost including cost of development not otherwise deducted: *Provided,* That in the case of such properties acquired prior to March 1, 1913, the fair market value of the property (or the taxpayer's interest therein) on that date shall be taken in lieu of cost up to that date: *Provided further,* That in the case of mines, oil and gas wells, discovered by the taxpayer, on or after March 1, 1913, and not acquired as the result of purchase of a proven tract or lease, where the fair market value of the property is materially disproportionate to the cost, the depletion allowance shall be based upon the fair market value of the property at the date of the discovery, or within thirty days thereafter; such reasonable allowance in all the above cases to be made under rules and regulations to be prescribed by the Commissioner with the approval of the Secretary. In the case of leases the deductions allowed by this paragraph shall be equitably apportioned between the lessor and lessee."

Section 5, Revenue Act of 1916, c. 463, 39 Stat. 756, 759, is in the margin.[1] Neither party suggests that this dif-

[1] "Sec. 5. That in computing net income in the case of a citizen or resident of the United States—

(a) For the purpose of the tax there shall be allowed as deductions—

* * * * *

"Eighth. (a) In the case of oil and gas wells a reasonable allowance for actual reduction in flow and production to be ascertained not by the flush flow, but by the settled production or regular flow; (b) in the case of mines a reasonable allowance for depletion thereof

fers from the corresponding provision in the act of 1918, *supra,* in any way here material.

In her claim presented to the tax officer for refund of overpayment for 1917 respondent said—

"Tax as assessed is based upon income received from royalties from iron ore mines. Depletion amounting to $99,561.20 was allowed to taxpayer, whereas depletion amounting to $203,510.86 should be allowed. The latter amount is the present worth of the ore mined in 1917, as of March 1, 1913, and is arrived at by discounting the amount received in 1917 at 5% to March 1, 1913."

A like statement appears in her claim concerning overpayment for 1918.

The declaration has two counts. The first, relating to payments for 1917, alleges—

"That the value or market price of said ore in the ground untouched and unextracted on March 1, 1913, and on all dates subsequent thereto, exceeded the sum of twenty-five cents per ton, so that every ton of ore paid for under said leases in the year 1917 was disposed of at a price actually less than the market price of the ore, and if then sold free of said lease, would have realized more than twenty-five cents per ton. The actual deple-

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not to exceed the market value in the mine of the product thereof, which has been mined and sold during the year for which the return and computation are made, such reasonable allowance to be made in the case of both (a) and (b) under rules and regulations to be prescribed by the Secretary of the Treasury: *Provided,* That when the allowances authorized in (a) and (b) shall equal the capital originally invested, or in case of purchase made prior to March first, nineteen hundred and thirteen, the fair market value as of that date, no further allowance shall be made. No deduction shall be allowed for any amount paid out for new buildings, permanent improvements, or betterments, made to increase the value of any property or estate, and no deduction shall be made for any amount of expense of restoring property or making good the exhaustion thereof for which an allowance is or has been made."

tion of the mines by each ton of ore extracted was more than twenty-five cents when extracted.

"That under the terms of the law the depletion for ore extracted or considered to be extracted was fixed at the market value of the ore in place in the mine at the time and place of extraction, but if such depletion allowance per ton exceeded the amount fixed as the royalty per ton in the lease, the depletion allowance to the plaintiff could not exceed such royalty, but since the royalty when paid included an amount of interest on the payment considered as deferred from March 1, 1913 to the date of actual payment of royalty *and* (sic) the allowance of such depletion in successive years could never exceed the market value of the ore in the mine on March 1, 1913.

"That each payment for ore extracted consisted of two parts, one of which was interest on the deferred payment and the other of which was the actual present worth of the payment deferred from March 1, 1913. Said actual present worth is accurately represented for each ton by that sum which put at interest on March 1, 1913, would produce at the date of payment for ore the royalty paid per ton; to put it in another way, the actual present worth of the ore extracted is accurately ascertained by taking from the royalty per ton paid, the part of the royalty, when and as paid, which represented interest on the deferred payment from March 1, 1913.

"That such an allowance of depletion in successive years and in the year 1917 did not and could not exceed the market value of such ore on March 1, 1913.

* * * * *

"That if of each payment for each ton of ore extracted, the amount of such payment which represents interest on the payment as deferred and actually paid, be figured, the income of the owner will be accurately

determined as that part of the twenty-five cents, which represents interest.

"That for the year 1917 a correct calculation under the rule above shows that upon the tons of ore extracted and paid for on January 14, 1917, of the payment of 25¢ per ton $0.2095 was for selling price or principal and $0.0405 was interest on the deferred payments and that on the 330,507 tons extracted the plaintiff was entitled to depletion of $69,251.05; that upon the ore paid for on April 10, 1917, $0.2074 was for selling price or principal and $0.0426 was interest on the deferred payments and that on the 48,958 tons extracted the plaintiff was entitled to depletion of $10,153.29; that on the ore paid for on July 10, 1917, $0.2053 was for selling price or principal and $0.0447 was interest on the deferred payments and that on the 231,090 tons extracted plaintiff was entitled to depletion of $47,434.55; that upon the ore paid for on October 10, 1917, $0.2032 was for selling price or principal and $0.0468 was interest on the deferred payments and that on the 432,120 tons extracted the plaintiff was entitled to depletion of $87,791.42; that plaintiff is entitled to depletion amounting for the year 1917 to $214,630.31."

Count two contains similar allegations concerning the payment for 1918.

In the trial court, after requests by both sides for directed verdict, the respondent had judgment and this was affirmed by the Circuit Court of Appeals.

The latter court said—

"The sole controversy is over the correctness of the Government's method of arriving at the value of the iron ore in the ground on March 1, 1913, a matter not covered by the revenue acts in question, nor by any regulation of the Treasury Department."

This does not accurately state our understanding of the issue. It was necessary for the taxpayer to show the illegality of the exactions. "The burden of establishing

that fact rested upon it, in order to show that it was entitled to the deduction which the Commissioner had disallowed, and that the additional tax was to that extent illegally assessed." *Botany Mills* v. *United States*, 278 U. S. 282, 289, 290; *United States* v. *Anderson*, 269 U. S. 422, 443. The real point is whether respondent established her claim for refund by adequate evidence. And we think she did not.

On March 1, 1913, she was the lessor of mines from which the lessee had the right to extract ore during many years, paying therefor when taken out 25 cents per ton. Her rights were merely to receive the royalties stipulated and to regain possession when the leases terminated. Manifestly, the fair market value of this interest in 1913 was much less than 25 cents per ton of the estimated contents of the mines, but respondent introduced no evidence which tended to show such value. The suggestion that market value per ton on March 1, 1913, was equivalent to the sum which if then put at simple interest would have amounted to 25 cents when the ore was actually taken out and the stipulated royalty became payable can not be accepted. This method of estimation would decrease the 1913 market value with the passing of every year. Moreover it disregards the fact that respondent's interest was in the mines considered as entireties and not in particular parts of ore beds which the lessee had agreed to remove during designated future years.

Under the statute it became necessary for respondent to establish the fair market value of her interest in the mines on March 1, 1913, or at least that such value was not below what she claimed it was. Otherwise, she could not recover. She introduced three witnesses who testified as to ore values. No one of them gave an estimate of the value of her interest at that time. Replying to the question, "You do not mean to testify that Mrs. Spalding's interest in that ton of ore as of March 1, 1913, or at any

other time, was worth 25 cents or any other sum," one of them said: "That question is based upon Mrs. Spalding's one-sixth ownership of a lease at 25 cents per ton. That question is an entirely different one from the one asked me by Mr. Zane. It would require a good deal of calculation and certain assumptions as to how fast that ore would be shipped. Then it would require discounting against those assumptions to present value. That calculation would take time, and I can not answer that without working it out." The other two gave no estimate of such value.

The judgment of the court below must be reversed. The cause will be remanded to the District Court for further proceedings in conformity with this opinion.

Reversed.

MR. JUSTICE BUTLER took no part in the consideration or decision of this cause.

UNITED RAILWAYS AND ELECTRIC COMPANY OF BALTIMORE *v.* WEST, CHAIRMAN, ET AL.

WEST, CHAIRMAN, ET AL. *v.* UNITED RAILWAYS AND ELECTRIC COMPANY OF BALTIMORE.

APPEALS FROM THE COURT OF APPEALS OF MARYLAND.

Nos. 55 and 64. Argued October 29, 1929.—Decided January 6, 1930.

1. Where a valuation of the property of a public utility has been made by a state commission and has been accepted by it and by the utility and by the state courts in a litigation over the question whether rates fixed by the commission allow a constitutionally adequate return upon that valuation, objections to it come too late when made by the commission, for the first time, in this Court upon the utility's appeal from a judgment sustaining the rate. P. 248.
2. The property of a public utility, although devoted to the public service and impressed with a public interest, is still private property; and neither the corpus of that property nor the use thereof

constitutionally can be taken for a compulsory price which falls below the measure of just compensation. One is confiscation no less than the other. P. 249.

3. What is a fair return within this principle cannot be settled by invoking decisions of this Court made years ago based upon conditions radically different from those which prevail today. The problem is one to be tested primarily by present day conditions. *Id.*
4. It is common knowledge that annual returns upon capital and enterprise, like wages of employees, cost of maintenance and related expenses, have materially increased the country over, so that a rate of return upon capital invested in street railway lines and other public utilities which might have been proper a few years ago no longer furnishes a safe criterion either for the present or the future. *Id.*
5. Nor can a rule fixing a rate of fair return be laid down which will apply uniformly to all sorts of utilities. What may be a fair return for one may be inadequate for another, depending upon circumstances, locality and risk. *Id.*
6. What will constitute a fair return in a given case is not capable of exact mathematical demonstration. It is a matter more or less of approximation about which conclusions may differ. The court in the discharge of its constitutional duty on the issue of confiscation must determine the amount to the best of its ability in the exercise of a fair, enlightened and independent judgment as to both law and facts. P. 251.
7. Just compensation for a utility, requiring for efficient public service skillful and prudent management as well as use of the plant, and whose rates are subject to public regulation, is more than current interest on mere investment. Sound business management requires that after paying all expenses of operation, setting aside the necessary sums for depreciation, payment of interest and reasonable dividends, there should still remain something to be passed to the surplus account; and a rate of return which does not admit of that being done is not sufficient to assure confidence in the financial soundness of the utility to maintain its credit and enable it to raise money necessary for the proper discharge of its public duties. P. 251.
8. In the present case, a return of less than 7.44%, the rate sought by the utility, would be confiscatory. P. 252.
9. Regulation of a state commission requiring a street railway company to abolish a second fare zone applied to a suburban extension of its lines without which the extension would be unprofitable, is

not subject to constitutional objection if the extension be an integral part of the railway system and if fares be so readjusted as to yield a fair return upon the property as a whole. P. 252.

10. In reaching its judgment sustaining rates fixed by a state commission, the state court ruled with the public utility and against the commission on the amount to be allowed the utility for annual depreciation, but against the utility on the adequacy of the rates. The utility appealed on the ground that the return yielded by the rates was inadequate and the commission took a cross-appeal and applied for certiorari on the ground that the allowance for depreciation was erroneous. *Held* that the ruling on the depreciation allowance could properly be reviewed in connection with the utility's appeal and that the petition for certiorari and the question of this Court's jurisdiction over the cross-appeal need not be considered. P. 253.

11. In determining adequate rates for a public utility, the allowances for annual depreciation must be based, not upon cost, but upon present value. P. 253.

157 Md. 70, reversed.

APPEALS from a judgment of the Court of Appeals of Maryland sustaining street railway fares fixed by the State Public Service Commission, in a suit by the Railway Company to enjoin their enforcement. The case is decided on the appeal of the Company. The cross-appeal of the commissioners is dismissed and their petition for certiorari denied. For another decision of the court below, at an earlier stage of the case, see 155 Md. 572.

Messrs. Charles McHenry Howard and *Charles Markell,* with whom *Mr. Henry H. Waters* was on the brief, for The United Railways & Electric Company of Baltimore.

I. Limitation by the Commission of the Company's rates to a return of less than eight per cent. is confiscatory. *Bluefield Co.* v. *Public Service Comm'n,* 262 U. S. 679; *Galveston Elec. Co.* v. *Galveston,* 258 U. S. 388; *Landon* v. *Court,* 269 Fed. 433; *Mobile Gas Co.* v. *Patterson,* 293 Fed. 208; *Southwestern Bell Tel. Co.* v. *Fort*

Smith, 294 Fed. 102; *New York Tel. Co.* v. *Prendergast,* 300 Fed. 822; *Southwestern Bell Tel. Co.* v. *Railway Comm'n,* 5 F. (2d) 77; *Brooklyn Gas Co.* v. *Prendergast,* 7 F. (2d) 628; *Consolidated Gas Co.* v. *Prendergast,* 6 F. (2d) 243; *Louisiana Water Co.* v. *Public Service Comm'n,* 294 Fed. 954; *New York Tel. Co.* v. *Prendergast,* 11 F. (2d) 162; *New York & Q. Gas Co.* v. *Prendergast,* 1 F. (2d) 351; *King's County Lighting Co.* v. *Prendergast,* 7 F. (2d) 192; *Ottinger* v. *Brooklyn Gas Co.,* 272 U. S. 579; *New York & R. Gas Co.* v. *Prendergast,* 10 F. (2d) 167; *Springfield Gas & Elec. Co.* v. *Public Service Comm'n,* 10 F. (2d) 252; *Houston Elec. Co.* v. *Houston,* 265 Fed. 360; *Brooklyn Borough Gas Co.* v. *Prendergast,* 16 F. (2d) 615; *United Gas Co.* v. *Railroad Comm'n,* 278 U. S. 300; *Interborough R. T. Co.* v. *Gilchrist,* 26 F. (2d) 912, reversed on other grounds, 279 U. S. 159; *Cambridge Elec. L. Co.* v. *Atwill,* 25 F. (2d) 485; *Los Angeles R. Corp'n* v. *Railroad Comm'n,* 29 F. (2d) 140, affirmed 280 U. S. 145; *Queens B. Gas & Elec. Co.* v. *Prendergast,* 31 F. (2d) 339.

For some years street railway properties have not generally been earning eight per cent. Consequently street railways have not been and are not being built to any extent. The return earned has not generally been equal to that generally made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties; and such companies have not been able to compete successfully for capital with other lines of industry.

In many respects the condition and the credit of street railway companies are worse than they were before the war—worse even in 1927 than in 1922. Since July 1, 1920, the average cost to the Company of borrowed money (other than current bank loans)—more than $18,000,000

in the aggregate—was 7.23 per cent, the lowest 6.6 per cent, the last 7.32 per cent. This experience is quite in line with the general situation of street railways, though not of other business generally. As Judge Parke says: "It would seem inevitable that a fair return on the property should be more than the cost of money obtained through the sale of bonds and other securities. *McCardle* v. *Indianapolis Water Co.*, 272 U. S. 400, 419, 420. The clear and convincing testimony in this case is that a basic rate of 6.26 per centum is not a fair return upon the property used, nor sufficient to enable the utility to maintain its credit or to secure its necessary capital at a reasonable cost." 155 Md. 612.

That a utility's right to a fair return may be lost by forbearance—or, if you will, delay—in asserting it, is the opposite of established doctrine. By enjoying inadequate rates too long, the public can not acquire a right to continue such rates still longer. On the contrary, under the decisions of this Court, the question is, not whether the utility has delayed too long before attacking a confiscatory rate, but whether it has waited long enough to make it reasonably clear that the rate will actually prove to be confiscatory. *Knoxville* v. *Knoxville Water Co.*, 212 U. S. 1; *Willcox* v. *Consolidated Gas Co.*, 212 U. S. 19; *Pennsylvania R. Co.* v. *Public Service Comm'n*, 126 Md. 59. It is not for the public to complain that the Company did not assert its rights sooner.

II. The Company's annual depreciation allowance is properly based on present value, not on cost, of its depreciable property.

On this question the Court of Appeals in effect holds that to base depreciation allowance on cost, instead of present value, is not only contrary to the Federal Constitution, and therefore contrary to the similar provisions of the Maryland Constitution, but also unreasonable, i. e.,

contrary to the state statute (Public Service Comm'n Law, § 43).

The Company "is entitled to see that from earnings the *value* of the *property invested* is kept unimpaired." *Knoxville* v. *Water Co., supra,* at p. 13.

"Investment" refers to "property invested," not to the money originally invested in the property. That is to say, "investment" is used in the sense of "that in which money is laid out or invested" (Century Dictionary) and not (as in the term "prudent investment") in the very recent special sense of cost as distinguished from value. At the moment when Mr. Justice Brandeis' dissenting opinion (*Southwestern Bell Tel. Co.* v. *Public Service Comm'n,* 262 U. S. 276) had brought the term "prudent investment" into vogue, this Court again used "investment" in the old sense, viz., "a fair and reasonable return on the capital investment—the value of the property." *Bluefield Co.* v. *Public Service Comm'n,* 262 U. S. 679.

However annual depreciation allowance is computed—whether directly as a percentage of property or indirectly by reference to gross earnings or otherwise—unless it fairly provides for return of property, i. e., value, the utility's constitutional rights are invaded. The law knows but one "rate base,"—not one for return of property and another for return on property. Unless rates are sufficient to yield both returns, property is confiscated.

None of the Justices has ever expressed an opinion that there could be one rate base, viz., value, for return on property and another, viz., cost, for depreciation, i. e., return of property. On the contrary, Mr. Justice Brandeis in his dissenting opinions has mentioned modern accounting (*Southwestern Bell Tel. Co.* v. *Public Service Comm'n,* 262 U. S. 309)—and particularly depreciation accounting (*Pacific Gas Co.* v. *San Francisco,* 265 U. S. 403)—as advantages of adopting "prudent investment" as the "rate

base." His opinions do not suggest that "prudent investment," i. e., cost, not value, already is the "rate base" for depreciation allowance, though not for fair return on property.

Whenever cost is material, e. g., when depreciation is computed for income tax purposes (cost being the statutory basis for computing taxable gain), then accounting rules and methods may furnish means for determining such cost—and such depreciation on such a cost basis. *United States* v. *Ludey,* 274 U. S. 295. So too, as was remarked by Judge Rose in language quoted by Judge Ulman, "in the absence of great changes in value" book cost "would be a fairly accurate measure for present value." *Chesapeake & P. Tel. Co.* v. *Whitman,* 3 F. (2d) 938. In other words, whenever in fact cost and value are not materially different in amount, then book cost (though not material as such) may conveniently and with approximate accuracy be used as evidence of value. *Board of Comm'rs* v. *N. Y. Tel. Co.,* 271 U. S. 23. When, however, cost is not material but value is, and in fact cost and value are materially different in amount, then accounting rules and methods concerning cost will not determine value or depreciation in value. The Constitution, law, and facts can not be changed by, or subordinated to, methods and convenience of accounting.

There is no judicial authority for such subordination of law to accounting, and establishment of two rate bases, value for return on property, cost for return of property, except a master's report in *Georgia Ry. & P. Co.* v. *Railroad Comm'n,* P. U. R. 1925 A, 546. In this respect the master's report is contrary to the clear implication of the previous language of this Court in the same case. The very fact that several commissions—by no means all (*Cincinnati & Suburban Bell Tel. Co.,* P. U. R. 1924 E, 849)—have held otherwise, and that convenience is a temptation to subordinate law to accounting, only em-

phasizes the lack of judicial support for so convenient a form of confiscation.

III. The abolition of the second fare to Halethorpe is unconstitutional and confiscatory.

Though exceptional circumstances, e. g., a long established *status quo*, may justify an unremunerative rate for part of a street railway system when rates as a whole are remunerative (*Puget Sound Traction Co.* v. *Reynolds*, 244 U. S. 574), gratuitous service can not be required and unremunerative rates can not arbitrarily be made still more unremunerative. On the contrary, the general rule is that a street railway, like other utilities, is entitled to substantial compensation for each part of its business. *Banton* v. *Belt Line Ry.*, 268 U. S. 413; *Chicago, M. & St. P. R. Co.* v. *Public Utilities Comm'n*, 274 U. S. 344.

The fact that a railroad company voluntarily established and continues unremunerative commutation rates to a certain suburban point on its line does not justify a commission in requiring the establishment of unremunerative commutation rates to more distant points on the same line. A commission order requiring such extension of commutation rates deprives the railroad company of property without due process of law. *Public Service Comm'n* v. *Atlanta & W. P. R. Co.*, 164 Ga. 822, P. U. R. 1928 B, 136.

Messrs. Raymond S. Williams and *Thomas J. Tingley*, with whom *Mr. John H. Lewin* was on the brief, for the Public Service Commission of Maryland.

The burden is on the Company to show that the action of the Commission, upheld by the Court of Appeals, in its final result and as a reality is necessarily confiscatory of its property under the rules of federal law. To succeed it must present a record here which shows that the rate of return, when applied to a rate base arrived at in accordance with federal law, would be confiscatory. Under the

rules sanctioned by this Court in confiscation cases, a value much lower than that found by the Commission under Maryland law would have resulted. It is our contention, therefore, that though the Commission established the value it did in accordance with Maryland law, it did so without giving consideration to the loss of value resulting from loss of traffic due to automobile competition, but did consider and give effect to this factor when fixing the rate of return. In this Court, therefore, the Company must show, but has failed to show, that the result of this action by the Commission necessarily results in the confiscation of its property. The Company can not have at one and the same time state law as to value and federal law as to rate of return. This Court should therefore affirm the decree on the Company's appeal, even though it may consider a rate of return of 6.26 per cent. too low, because this record on the one hand discloses that the actual return permitted the Company would constitute a much higher percentage of a rate base arrived at by the application of federal rules, and on the other hand does not negative the presumption that so regarded it would constitute so high a percentage of a federal rate base as to meet this Court's approval.

The Commission was compelled by the ruling of the Court of Appeals in this case to fix the depreciation allowance on value instead of on cost. We contend that this view of the Court of Appeals is erroneous and contrary to the doctrine of this Court, and that consequently the Company is now permitted, under the rates of fare fixed by the Commission, to collect an annual sum for depreciation much in excess of that required to make good the depreciation in fact suffered by it.

In *United States* v. *Ludey,* 274 U. S. 295, this Court considered the question of the basis on which to calculate, under the income tax law, the profit realized upon a sale of property. It was held that the annual depreci-

ation must be deducted from the original cost (or the value, if higher than cost, of that acquired before 1913) in order to ascertain the cost of the property sold. The property in question in the case consisted, besides mining equipment, in part of oil land. No distinction, however, was made between such property and that used in any other business. The rule thus announced by this Court is the rule universally followed and practiced by accountants. It is no mere bookkeeping formula, but is a rule of substance.

The practice of commissions has been to base depreciation on cost. *Missouri U. Tel. Co.*, P. U. R. 1926 A, 842; *Kansas City Gas Co.*, P. U. R. 1925 A, 653; *Jackson County Light, H. & P. Co.*, P. U. R. 1926 D, 737; *Aluminum Goods Mfg. Co.* v. *Laclede Gas Co.*, P. U. R. 1927 B, 1; *Kinlock-Bloomington Tel. Co.*, P. U. R. 1927 E, 135; *Freeport* v. *Freeport Gas Co.*, P. U. R. 1924 E, 99; *Rockford Gas L. & C. Co.*, P. U. R. 1922 E, 756; *Rockford Elec. Co.*, P. U. R. 1925 D, 1954; *Baird* v. *Burleson*, P. U. R. 1920 D, 529; *Milwaukee Elec. R. & L. Co.* v. *Milwaukee*, P. U. R. 1918 E, 1; *Wisconsin-Minnesota L. & P. Co.* P. U. R. 1920 D, 428; *Butler Tel. Co.*, P. U. R. 1927 C, 800; *Coast Gas Co.*, P. U. R. 1923 A, 349; *Elizabethtown Water Co.*, P. U. R. 1927 E, 39; *Duluth R. Co.*, P. U. R. 1927 A, 41; *Big Spring Elec. Co.*, P. U. R. 1927 A, 655.

In the court below, the Company cited the following cases from this Court as sustaining its position. *Knoxville* v. *Water Co.*, 212 U. S. 1; *Minnesota Rate Cases*, 230 U. S. 352; *Southwestern Bell Tel. Co.* v. *Service Comm'n*, 262 U. S. 274; *Bluefield Co.* v. *Service Comm'n*, 262 U. S. 679; *Brush Elec. Co.* v. *Galveston*, 262 U. S. 443; *Georgia R. Co.* v. *Railroad Comm'n*, 262 U. S. 625.

Various expressions in the opinions in these cases were seized upon and claimed to sustain the Company's position. In no one of them was there any discussion of the point. We submit that it can not now be asserted that

so important a question of law has been foreclosed by this Court without discussion. On the contrary, we submit that the *Knoxville* case is authority for our position. There this Court speaks of the duty of a public utility company to make an annual depreciation charge so that it shall keep "the investment unimpaired." Furthermore, the question there at issue was whether in fixing the value of a plant the Company was entitled to add to the rate base certain amounts for so-called complete and incomplete depreciation which had not in fact been taken by it in the past. This claim was rejected.

The real rate of return received by the Company is greater than 6.26 per cent., but even if this is not so, the Company has not met the burden of showing that such rate is confiscatory, when the question is considered with relation to all relevant facts.

There was ample evidence to sustain the finding of the Commission that a rate of return of 6.26 per cent. is reasonable.

The most recent cases show a strong tendency to approve rates of return lower than the rates held reasonable during the period following the World War. *Galveston Elec. Co.* v. *Galveston,* 258 U. S. 388; *Greencastle Water Works* v. *Public Service Comm'n,* 31 F. (2d) 600; *Cambridge Elec. L. Co.* v. *Atwill,* 25 F. (2d) 485; *Chesapeake & P. Tel. Co.* v. *Virginia,* 147 Va. 43; *Chesapeake & P. Tel. Co.* v. *Whitman,* 3 F. (2d) 938.

In the court below the Company relied strongly on a series of cases dealing (with one exception, a telephone company) with gas companies, located in or near New York City, wherein returns of 8 per cent. were allowed. The period of time embraced in those decisions was from 1924 to 1926. In none of the cases did this Court rule that a return of less than 8 per cent. was confiscatory.

This Court has laid down no unvarying rule that any specific rate of return is necessary to avoid confiscation,

Dayton-Goose Creek R. Co. v. *United States,* 263 U. S. 456.

Bluefield Water Co. v. *Public Service Comm'n,* 262 U. S. 679, holding that 6 per cent. was substantially too low to constitute just compensation was decided in 1923. In *McCardle* v. *Indianapolis Water Co.,* 272 U. S. 400, a rate of 7 per cent. found by the Commission on November 28, 1923, was sustained against attack, this Court saying, page 419, " the evidence is more than sufficient to sustain the rate of 7 per cent. found by the Commission and recent decisions support a higher rate of return." These decisions, referred to in a footnote to the opinion, range in date from 1919 to 1925. See also *Monroe Gas L. & F. Co.* v. *Public Utilities Comm'n,* 11 F. (2d) 319; *Pacific Tel. & Tel. Co.* v. *Whitcomb,* 12 F. (2d) 279, affirmed in *Denny* v. *Pacific Tel. & Tel. Co.,* 276 U. S. 97; *Idaho Power Co.* v. *Thompson,* 19 F. (2d) 547.

It is a well established rule of law that rates must in all events be reasonable to the public affected. *Chicago, M. & St. P. R. Co.* v. *Minnesota,* 134 U. S. 418; *Covington & L. T. Road Co.* v. *Sandford,* 164 U. S. 578; *Smyth* v. *Ames,* 169 U. S. 466; *San Diego L. & T. Co.* v. *Nat'l City,* 174 U. S. 739; *Simpson* v. *Shepherd,* 230 U. S. 352; *Darnell* v. *Edwards,* 244 U. S. 564; *Public Service Comm'n* v. *Water Co.,* 136 Atl. 447; *Re San Diego Consolidated Gas & Elec. Co.,* P. U. R. 1919 D, 924; *Danbury* v. *Danbury Gas Co.,* P. U. R. 1921 D, 731; *Re Richmond L. H. E. L. Co.,* P. U. R. 1917 B, 300; *Re Idaho Power Co.,* P. U. R. 1927 C, 731; *Re Castine Water Co.,* P. U. R. 1924 B, 529; *Re Public Franchise League,* 24 Mass. G. & E. L. C. R. 20; *Re Capital City Water Co.,* P. U. R. 1918 D, 561; *Re Manchester & D. St. Ry. Co.,* P. U. R. 1916 F, 526; *Re Bennington Water Co.,* P. U. R. 1922 B, 385; Spurr, Guiding Principles of Public Service Regulation, vol. 3, p. 530.

This is true even though the rates fail to yield a fair return on the fair value of the property, the right to the return being subject to the limitation that the rates must be reasonable. *Re Lewiston Gas L. Co.*, P. U. R. 1921 A, 561; *Kansas City* v. *Kansas City L. & P. Co.*, P. U. R. 1918 C, 659.

The principle that rates must in no event exceed the value of the service, regardless of return or confiscation, is as old and as firmly established as the rule that a utility is entitled, when that principle is inapplicable, to a fair return on the fair value of its property. *Chicago, M. & St. P. R. Co.* v. *Minnesota*, 134 U. S. 418; *Covington & L. T. R. Co.* v. *Sandford*, 164 U. S. 578. *San Diego L. & T. Co.* v. *Nat'l City*, 174 U. S. 739; *Simpson* v. *Shepard*, 230 U. S. 352. See also the opinion of Mr. Justice Brandeis in *Southwestern Tel. Co.* v. *Service Comm'n*, 262 U. S. 276. No limitation of the rule to moribund or developing business was contained in any of these cases.

The present value of a street car ride is not in excess of a token charge of eight and three-quarter cents. *Re Fonda, J., etc. R. Co.*, P. U. R. 1927 B, 762; *Re Western N. Y. & Penna. T. Co.*, P. U. R. 1920 A, 951; *Donham* v. *Service Comm'n*, 232 Mass. 309; *Re Middlesex & B. S. R. Co.*, P. U. R. 1919 F, 40; *Wood* v. *Elmira Light, W. & R. Co.*, P. U. R. 1927 B, 400.

The action of the Commission in abolishing the second fare on the Company's Halethorpe line was based on substantial evidence and was lawful. In a case where, as here, the question is as to the reasonableness of an entire schedule of rates, particular rates on particular lines are immaterial if the schedule as a whole is reasonable. *Portland Ry., L. & P. Co.* v. *Railroad Comm'n*, 229 U. S. 397; *Puget Sound Traction Co.* v. *Reynolds*, 244 U. S. 574; Spurr, Guiding Principles of Public Service Regulation, vol. 3, p. 207, *et seq.*

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

The first of these titles (No. 55) is an appeal, and the second (No. 64) a cross-appeal, from a decree of the Court of Appeals of Maryland. The case arose from an order of the state Public Service Commission limiting the rate of passenger fares to be charged by the United Railways and Electric Company for carrying passengers over its lines in the City of Baltimore. The company, by its appeal, attacks the commission's order as confiscatory. The cross-appeal seeks to raise the question whether the amount for annual depreciation allowed the company should be calculated upon the present value of the company's property or upon its cost.

Upon application of the company to the commission, made in 1927, for an increase in fares, the commission passed an order making an increase, but not to the extent sought. Thereupon, suit was brought in a state circuit court on the grounds that the rate fixed by the commission was confiscatory and that the annual allowance for depreciation was calculated upon a wrong basis, namely, upon cost, instead of present value of depreciable property. The circuit court, in an able opinion, sustained the company upon both grounds, and enjoined the enforcement of the commission's order. On appeal, the court of appeals upheld the view of the circuit court in respect of depreciation, but held the rate of return not confiscatory. 155 Md. 572. Thereupon, the commission increased the depreciation allowance in accordance with the decree of the court and adjusted the rate of fare to the extent necessary to absorb the increased allowance. A second suit and an appeal to the court of appeals followed, and that court entered a decree, 157 Md. 70, sustaining the action of the commission; and it is that decree which is here for review.

The facts, so far as we find it necessary to review them, are not in dispute. The company since 1899 has owned and operated all the street railway lines in the City of Baltimore. Its present capital structure consists of $24,000,000 of common stock, $38,000,000 of ordinary bonded indebtedness, and $14,000,000 of perpetual income bonds redeemable at the option of the company after 1949. Due to the increased use of automobiles, the total number of passengers carried has for some time steadily decreased, while the number carried during the "rush hours" has increased. This has resulted in an increase of expenses in proportion to the whole number of passengers carried, since equipment, etc., must be maintained and men employed sufficient to care for the increased business of the "rush hours," notwithstanding their reduced productiveness during the hours of decreased business. Since the war operating expenses have almost if not quite doubled.

The present value of the property used was fixed by the commission at $75,000,000, and this amount was accepted without question by both parties in the state circuit court and in the court of appeals. Included in this valuation is $5,000,000 for easements in the streets of Baltimore. The court of appeals had held in another and earlier case, *Miles* v. *Pub. Serv. Comm.*, 151 Md. 337, that the easements constituted an interest in real estate and that in making up the rate base their value should be included. The commission in the present case, accordingly, included the amount in the valuation and made no attack upon the item in the courts below, where it passed as a matter not in dispute. The item is now challenged by counsel for the commission in this Court, and other objections to the valuation are suggested, likewise for the first time. We do not find it necessary to consider this challenge or these objections, for, if they

ever possessed substance, they come too late. In the further consideration of the case, therefore, we accept, for all purposes, the valuation of $75,000,000 as it was accepted and acted upon by parties, commission and courts below.

The commission fixed a rate of fare permitting the company to earn a return of 6.26 per cent. on this valuation; and, so far as No. 55 is concerned, the case resolves itself into the simple question whether that return is so inadequate as to result in a deprivation of property in violation of the due process of law clause of the Fourteenth Amendment. In answering that question, the fundamental principle to be observed is that the property of a public utility, although devoted to the public service and impressed with a public interest, is still private property; and neither the corpus of that property nor the use thereof constitutionally can be taken for a compulsory price which falls below the measure of just compensation. One is confiscation no less than the other.

What is a fair return within this principle cannot be settled by invoking decisions of this Court made years ago based upon conditions radically different from those which prevail today. The problem is one to be tested primarily by present day conditions. Annual returns upon capital and enterprise, like wages of employees, cost of maintenance and related expenses, have materially increased the country over. This is common knowledge. A rate of return upon capital invested in street railway lines and other public utilities which might have been proper a few years ago no longer furnishes a safe criterion either for the present or the future. *Lincoln Gas Co.* v. *Lincoln,* 250 U. S. 256, 268. Nor can a rule be laid down which will apply uniformly to all sorts of utilities. What may be a fair return for one may be inadequate for another, depending upon circumstances, locality and risk.

Willcox v. *Consolidated Gas Co.*, 212 U. S. 19, 48–50. The general rule recently has been stated in *Bluefield Co.* v. *Pub. Serv. Comm.*, 262 U. S. 679, 692–695:

"What annual rate will constitute just compensation depends upon many circumstances and must be determined by the exercise of a fair and enlightened judgment, having regard to all relevant facts. A public utility is entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience of the public equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties; but it has no constitutional right to profits such as are realized or anticipated in highly profitable enterprises or speculative ventures. The return should be reasonably sufficient to assure confidence in the financial soundness of the utility and should be adequate, under efficient and economical management, to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties. A rate of return may be reasonable at one time and become too high or too low by changes affecting opportunities for investment, the money market and business conditions generally.

* * * * *

"Investors take into account the result of past operations, especially in recent years, when determining the terms upon which they will invest in such an undertaking. Low, uncertain or irregular income makes for low prices for the securities of the utility and higher rates of interest to be demanded by investors. The fact that the company may not insist as a matter of constitutional right that past losses be made up by rates to be applied in the present and future tends to weaken credit, and the fact that the utility is protected against being compelled

to serve for confiscatory rates tends to support it. In this case the record shows that the rate of return has been low through a long period up to the time of the inquiry by the commission here involved."

What will constitute a fair return in a given case is not capable of exact mathematical demonstration. It is a matter more or less of approximation about which conclusions may differ. The court in the discharge of its constitutional duty on the issue of confiscation must determine the amount to the best of its ability in the exercise of a fair, enlightened and "independent judgment as to both law and facts." *Ohio Valley Co.* v. *Ben Avon Borough,* 253 U. S. 287, 289; *Bluefield Co.* v. *Pub. Serv. Comm., supra,* pp. 689, 692; *Lehigh Valley R. R.* v. *Commissioners,* 278 U. S. 24, 36.

There is much evidence in the record to the effect that in order to induce the investment of capital in the enterprise or to enable the company to compete successfully in the market for money to finance its operations, a net return upon the valuation fixed by the commission should be not far from 8 per cent. Since 1920 the company has borrowed from time to time some $18,000,000, upon which it has been obliged to pay an average rate of interest ranging well over 7 per cent., and this has been the experience of street railway lines quite generally. Upon the valuation fixed, with an allowance for depreciation calculated with reference to that valuation, and upon the then prescribed rates, the company for the years 1920 to 1926, both inclusive, obtained a return of little more than 5 per cent. per annum. It is manifest that just compensation for a utility, requiring for efficient public service skillful and prudent management as well as use of the plant, and whose rates are subject to public regulation, is more than current interest on mere investment. Sound business management requires that after paying all expenses of operation, setting aside the necessary sums for depre-

ciation, payment of interest and reasonable dividends, there should still remain something to be passed to the surplus account; and a rate of return which does not admit of that being done is not sufficient to assure confidence in the financial soundness of the utility to maintain its credit and enable it to raise money necessary for the proper discharge of its public duties. In this view of the matter, a return of 6.26 per cent. is clearly inadequate. In the light of recent decisions of this Court and other Federal decisions, it is not certain that rates securing a return of 7½ per cent. or even 8 per cent. on the value of the property would not be necessary to avoid confiscation.[1] But this we need not decide, since the company itself sought from the commission a rate which it appears would produce a return of about 7.44 per cent., at the same time insisting that such return fell short of being adequate. Upon the present record, we are of opinion that to enforce rates producing less than this would be confiscatory and in violation of the due process clause of the Fourteenth Amendment.

Complaint also is made of the action of the commission in abolishing the second fare zone established by the

[1] See, for example, *Galveston Elec. Co.* v. *Galveston*, 258 U. S. 388, 400; *Brush Elec. Co.* v. *Galveston*, 262 U. S. 443; *Fort Smith* v. *Southwestern Bell Tel. Co.*, 270 U. S. 627, affirming *per curiam Southwestern Bell Tel. Co.* v. *Fort Smith*, 294 Fed. 102, 108; *Patterson* v. *Mobile Gas Co.*, 271 U. S. 131, affirming in part *Mobile Gas Co.* v. *Patterson*, 293 Fed. 208, 221; *McCardle* v. *Indianapolis Water Co.*, 272 U. S. 400, 419 and note; *Ottinger* v. *Brooklyn Union Gas Co.*, 272 U. S. 579, modifying and affirming *Kings County Lighting Co.* v. *Prendergast*, 7 F. (2d) 192, and *Brooklyn Union Gas Co.* v. *Prendergast*, 7 F. (2d) 628; *Railroad & Warehouse Commission* v. *Duluth Street R. Co.*, 273 U. S. 625, affirming *Duluth Street R. Co.* v. *Railroad & Warehouse Commission*, 4 F. (2d) 543; Minneapolis v. *Rand*, 285 Fed. 818, 830; *New York Telephone Co.* v. *Prendergast*, 300 Fed. 822, 826; *id.*, 11 F. (2d) 162, 163; *New York & Richmond Gas Co.* v. *Prendergast*, 10 F. (2d) 167, 209.

company on what is called the Halethorpe line and substituting a single fare for the two fares theretofore exacted. Halethorpe is an unincorporated community lying outside the limits of Baltimore city. With a single fare, the extension of the line to Halethorpe is not profitable, but, nevertheless, it is an integral part of the railway system, and it will be enough if the commission shall so readjust the fares as to yield a fair return upon the property, including the Halethorpe line, as a whole. If, in doing so, the commission shall choose, not to restore the second fare, but to retain in force the single fare, we perceive no constitutional objection.

The commission sought a review of the question in respect of the annual depreciation allowance, both by a cross-appeal and, later, by petition for certiorari. The question of jurisdiction on the cross-appeal as well as the consideration of the petition for certiorari was postponed to the hearing on the merits. We do not now find it necessary to decide either matter. As the amount of depreciation to be allowed was contested throughout, is a necessary element to be determined in fixing the rate of fare and is closely related in substance to the case brought here by the company's appeal, it well may be considered in connection therewith. In these circumstances neither cross-appeal nor certiorari is necessary to present the question.

The allowance for annual depreciation made by the commission was based upon cost. The court of appeals held that this was erroneous and that it should have been based upon present value. The court's view of the matter was plainly right. One of the items of expense to be ascertained and deducted is the amount necessary to restore property worn out or impaired, so as continuously to maintain it as nearly as practicable at the same level of efficiency for the public service. The amount set aside

periodically for this purpose is the so-called depreciation allowance. Manifestly, this allowance cannot be limited by the original cost, because, if values have advanced, the allowance is not sufficient to maintain the level of efficiency. The utility "is entitled to see that from earnings the value of the property invested is kept unimpaired, so that at the end of any given term of years the original investment remains as it was at the beginning." *Knoxville* v. *Knoxville Water Co.*, 212 U. S. 1, 13–14. This naturally calls for expenditures equal to the cost of the worn out equipment at the time of replacement; and this, for all practical purposes, means present value. It is the settled rule of this Court that the rate base is present value, and it would be wholly illogical to adopt a different rule for depreciation. As the Supreme Court of Michigan, in *Utilities Commission* v. *Telephone Co.*, 228 Mich. 658, 666, has aptly said: "If the rate base is present fair value, then the depreciation base as to depreciable property is the same thing. There is no principle to sustain a holding that a utility may earn on the present fair value of its property devoted to public service, but that it must accept and the public must pay depreciation on book cost or investment cost regardless of present fair value. We repeat, the purpose of permitting a depreciation charge is to compensate the utility for property consumed in service, and the duty of the commission, guided by experience in rate making, is to spread this charge fairly over the years of the life of the property." And see *Southwestern Bell Tel. Co.* v. *Pub. Serv. Comm.*, 262 U. S. 276, 288; *Georgia Railway & P. Co.* v. *Railroad Commission*, 262 U. S. 625, 633.

We conclude that an injunction should have been granted against the commission's order.

No. 55. Decree reversed and cause remanded for further proceedings not inconsistent with this opinion.

No. 64. Cross-appeal dismissed. Certiorari denied.

MR. JUSTICE BRANDEIS, dissenting.

Acting under the direction of the Court of Appeals, *Public Service Commission* v. *United Railways & Electric Co.*, 155 Md. 572, the Commission entered, on November 28, 1928, an order permitting the Railways to increase its rate of fare to 10 cents cash, four tokens for 35 cents.[1] That order was sustained in *United Railways & Electric Co.* v. *West,* 157 Md. 70, and the Railways has appealed to this Court. The claim is that the order confiscates its property because the fare fixed will yield, according to the estimates, no more than 6.26 per cent. upon the assumed value. There are several reasons why I think the order should be held valid.

A net return of 6.26 per cent. upon the present value of the property of a street railway enjoying a monopoly in one of the oldest, largest and richest cities on the Atlantic Seaboard would seem to be compensatory. Moreover, the estimated return is in fact much larger, if the

[1] The rate of fare on the Railways' lines had been 5 cents until 1918. Then it applied for authority to increase its fares "purely as a war emergency and during the period of war conditions". Six increases have since been granted: to 6 cents on January 7, 1919, Re United Rys. & Elec. Co., P. U. R. 1919C, 7; to 7 cents cash, four tokens for 26 cents, on September 30, 1919, Re United Rys. & Elec. Co., P. U. R. 1920A, 1; to a flat 7 cents on December 31, 1919, Re United Rys. & Elec. Co., P. U. R. 1920A, 995; to 8 cents, two tokens for 15 cents, on May 26, 1924, Re United Rys. & Elec. Co., P. U. R. 1924D, 713. This was the rate of fare when, on August 1, 1927, the Railways filed with the Commission the present application for a flat 10 cent fare. In its original decision thereon the Commission authorized a fare of 9 cents cash, three tokens for 25 cents, Re United Rys. & Elec. Co., P. U. R. 1928C, 604. To provide the additional revenue required by the decision of the Court of Appeals concerning depreciation, the Commission then raised the fare to 10 cents cash, four tokens for 35 cents, Re United Rys. & Elec. Co., P. U. R. 1929A, 180. The Railways is still seeking to secure a flat 10 cent fare. The Railways had by order of the Commission been protected from jitney competition. See P. U. R. 1928C, 604. 632.

rules which I deem applicable are followed. It is 6.70 per cent. if, in valuing the rate base, the prevailing rule which eliminates franchises from a rate base is applied. And it is 7.78 per cent. if also, in lieu of the deduction for depreciation ordered by the Court of Appeals, the amount is fixed, either by the method of an annual depreciation charge computed according to the rules commonly applied in business, or by some alternative method, at the sum which the long experience of this railway proves to have been adequate for it.

First. The value of the plant adopted by the Commission as the rate base was fixed by it at $75,000,000 in a separate valuation case, decided on March 9, 1926, modified, pursuant to directions of the Court of Appeals,[2] on February 1, 1928, and not before us for review, *Re United Railways & Electric Co.*, P. U. R. 1926C, 441, P. U. R. 1928B, 737. Included in this total is $5,000,000 representing the value placed upon the Railways' so-called "easements." If they are excluded, the estimated yield found by the Commission would be increased by .44 per cent. That is, the net earnings, estimated at $4,691,606 would yield, on a $70,000,000 rate base, 6.70 per cent. The People's Counsel contended that since these "easements" are merely the privileges gratuitously granted to the Railways by various county and municipal franchises to lay tracks and operate street cars on the public highways,[3] they should be excluded from the rate base when considering whether the order is confiscatory in violation of the Federal Constitution. This alleged error of federal law in the valuation may be considered on this appeal. For, the rate allowed by the Commission is attacked on the assumption that the return on the property is only

[2] *Miles* v. *Public Service Comm'n*, 151 Md. 337.

[3] A small part of these "easements" are privileges granted by franchises to operate street cars on portions of the streets which the public uses only at intersections with other streets.

6.26 per cent.[4] Compare *United States* v. *American Ry. Express Co.*, 265 U. S. 425, 435; *Union Tool Co.* v. *Wilson*, 259 U. S. 107, 111.

Where a rate order is alleged to be void under the Federal Constitution because confiscatory, the question whether a specific class of property should be included in the rate base is to be determined not by the state law, but by the federal law. Whether the return is sufficient under the state law is a question which does not concern us. We are concerned solely with the adequacy or inadequacy of the return under the guarantees of the federal law. In determining whether a prescribed rate is confiscatory under the Federal Constitution, franchises are not to be included in valuing the plant, except for such amounts as were actually paid to the State, or a political subdivision thereof, as consideration for the grant. *Cedar Rapids Gas Light Co.* v. *Cedar Rapids*, 223 U. S. 655, 669; *Des Moines Gas Co.* v. *Des Moines*, 238 U. S. 153, 169; *Galveston Electric Co.* v. *Galveston*, 258 U. S. 388, 396; *Georgia Railway & P. Co.* v. *Railroad Commission*, 262 U. S. 625, 632.[5] Franchises to lay pipes or tracks in the public streets, like franchises to conduct the business as a corporation, are not donations to a utility of property by the use of which profit may be made. They are privileges granted to utilities to enable them to employ their

[4] The Commission's opinions and orders in the valuation proceeding are referred to in the several pleadings and are printed as part of the record in this case.

[5] Also *Westinghouse Electric & Mfg. Co.* v. *Denver Tramway Co.*, 3 F. (2d) 285, 302, affirmed *sub nom. City and County of Denver* v. *Denver Tramway Co.*, 23 F. (2d) 287; *Public Utilities Commission* v. *Capital Traction Co.*, 17 F. (2d) 673, 675–6; Re Capital City Telegraph Co., P. U. R. 1928D, 763, 766, 776 (Mo.); Re Trac. Gas Co., P. U. R. 1927C, 177, 181 (Cal.), Re Southern Pacific Co., P. U. R. 1926A, 298, 303; Re Potomac Electric Power Co., P. U. R. 1917D, 563, 680. No case has been found which accepts the rule laid down by the Court of Appeals.

property in the public service and make profit out of such use of that property. As stated in the New Hampshire statute, "all such franchises, rights and privileges being granted in the public interest only" are "not justly subject to capitalization against the public." [6]

Had the "easements" been called franchises it is probable that no value would have been ascribed to them for rate-making purposes. For the Maryland public utilities law, in common with the statutes of many States,[7] forbids the capitalization of franchises. But calling these privileges "easements" does not differentiate them for rate purposes from ordinary corporate franchises, when applying the Federal Constitution. In none of the cases excluding franchises from plant value was any distinction made, in this respect, between ordinary corporate franchises and franchises to use the public streets, although many of the cases involved privileges of the latter type.

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[6] *New Hampshire*—P. L. 1926, Vol. 2, ch. 24, § 10, p. 943.

[7] *Arizona*—Rev. Stat. 1913, § 2328(b), p. 811; *California*—Public Utilities Law, § 52b, Deering Codes & Gen. L. Supp. 1925–1927, Act 6386, § 52(b), p. 1811; *Idaho*—Comp. Stat. 1919, Vol. 1, § 4290, p. 1221; *Illinois*—Cahill's Rev. Stat. 1929, Ch. 11a, § 36, p. 2047; *Indiana*—Burns' Ann. Stat. 1926, Vol. 3, § 12763, p. 1258; *Maryland*—Bagby's Ann. Code, 1924, Vol. 1, Art. 23, § 381, p. 832; *Missouri*—Rev. Stat. 1919, Vol. 3, §§ 10466, 10484, 10508, pp. 3245, 3262, 3279; *Nebraska*—Comp. Stat. 1922, § 676, p. 321, amended by L. 1925, ch. 141; *New Hampshire*—P. L. 1926, Vol. 2, ch. 241, § 10, p. 943; *New Jersey*—1911–1924, Cum. Supp. to Comp. Stat. Vol. 2, *167–24, p. 2886; *New York*—Cahill's Cons. L. 1923, ch. 49, §§ 69, 101, pp. 1746, 1759; 1929 Supp. ch. 49, §§ 55, 82, pp. 282, 283; *Pennsylvania*—Stat. 1920 (West Pub. Co.) § 18095, p. 1745. Some of the statutes, in addition to prohibiting the capitalization of franchises, specifically direct that no franchise shall be valued for rate-making purposes: *Iowa*—Code 1927, § 8315, p. 1076; *Minnesota*—Gen. Stat. 1923, Chap. 28, § 4823, p. 683; § 5304, p. 733; *North Dakota*—Supp. to Comp. Laws, 1913–1925, ch. 13B, § 4609c37, p. 969; § 4609c40, p. 971; *Ohio*—Throckmorton's Ann. Code, 1929, §§ 614–23, 614–46, 614–59, pp. 156, 160, 164; *Wisconsin*—Stat. 1925, Vol. 1, 184.15, p. 1446.

The Court of Appeals and the Commission were influenced by the fact that the so-called "easements" were taxed. This fact does not justify including them in the rate base. Corporate franchises are frequently taxed; [8] and although taxed, are not valued for rate purposes. Compare *Georgia Railway & P. Co.* v. *Railroad Commission,* 278 Fed. 242, 244–5. The "easements" differ from ordinary franchises only in the technicality that, under the law of Maryland, the right to use the streets is, for taxation purposes, real property, whereas ordinary franchises are personal property.

Second. The amount which the Commission fixed, in its original report, as the appropriate depreciation charge was $883,544. That sum is 5 per cent. of the estimated gross revenues. Referring to the method of arriving at the amount of the charge the Commission there said: "The Commission believes that it might be more logical to base the annual allowance for depreciation upon the cost of depreciable property, rather than upon gross revenues. The relation between gross revenues and depreciation is remote and indirect while there is a direct relation between the cost of a piece of property and the amount that ought to be set aside for its consumption by use. However, the allowance which this Commission has made for depreciation, 5 per cent. of the gross revenues, has provided fairly well for current depreciation and retirements . . . Moreover, there is a broad twilight zone between depreciation and maintenance, and it may well be (and without any impropriety) that the maintenance account has been used to a certain extent to provide for depreciation. . . Any increase in the gross revenues resulting from an increase in fares would increase the amounts that would be set aside for depreciation and

[8] *Society For Savings* v. *Coite,* 6 Wall. 594; *Cream of Wheat Co.* v. *Grand Forks,* 253 U. S. 325, 328; *Roberts & Schaefer Co.* v. *Emmerson,* 271 U. S. 50, 55.

maintenance." [9] Without deciding that this allowance was inadequate, the Court of Appeals held that, as a matter of law, the depreciation charge should be based upon the then value of the depreciable property as distinguished from its cost; and directed the Commission to revise its estimates accordingly. Pursuant to that direction, the Commission added, in its supplemental report, $755,116 to the depreciation charge. The addition was, I think, ordered by the Court of Appeals under a misapprehension of the nature and function of the depreciation charge. And, in considering the adequacy of the return under the Federal Constitution, the estimate of the net earnings should accordingly be increased by $755,116, which, on the rate base of $70,000,000, would add 1.08 per cent. to the estimated return.

That the Court of Appeals erred in its decision becomes clear when the nature and purpose of the depreciation charge are analyzed and the methods of determining its proper amount are considered. The annual account of a street railway, or other business, is designed to show the profit or loss, and to acquaint those interested with the condition of the business. To be true, the account must reflect all the operating expenses incurred within the accounting period. One of these is the wearing out of plant. Minor parts, which have short lives and are consumed wholly within the year, are replaced as a part of current repairs.[10] Larger plant units, unlike supplies, do

[9] P. U. R. 1928C, 604, 637, 640, 641.

[10] Compare Classification of Operating Revenues and Operating Expenses of Steam Roads prescribed by Interstate Commerce Commission, issue of 1914, Special Instructions No. 2, p. 31. As to practice of the telephone companies (Bell system), see testimony on rehearing of Telephone and Railroad Depreciation Charges, 118 I. C. C. 295, Docket Nos. 14700 and 15100, L. G. Woodford, March 19, 1928 (Printed by American Tel. & Tel. Co.), pp. 52–3.

not wear out within a single accounting period. They have varying service lives, some remaining useful for many years. Experience teaches that at the end of some period of time most of these units, too, will wear out physically or cease to be useful in the service. If the initial outlay for such units is entirely disregarded, the annual account will not reflect the true results of operation and the initial investment may be lost. If, on the other hand, this original expense is treated as part of the operating expenses of the year in which the plant unit was purchased, or was retired or replaced, the account again will not reflect the true results of operation. For operations in one year will then be burdened with an expense which is properly chargeable against a much longer period of use. Therefore, in ascertaining the profits of a year, it is generally deemed necessary to apportion to the operations of that year a part of the total expense incident to the wearing out of plant. This apportionment is commonly made by means of a depreciation charge.[11]

It is urged by the Railways that if the base used in determining what is a fair return on the use of its property is the present value, then logically the base to be used in determining the depreciation charge—a charge for the consumption of plant in service—must also be the pres-

[11] The depreciation charge or allowance is the annual or monthly amount thus apportioned as the year's equitable share of the expense of ultimate retirement of plant. The yearly charge is by many concerns allocated in monthly instalments. A depreciation reserve is a bookkeeping classification to which the depreciation charges are periodically credited. A depreciation fund is a fund separately maintained in which amounts charged for depreciation are periodically deposited. A depreciation reserve does not necessarily connote the existence of a separate fund. E. A. Saliers, Depreciation, Principles and Applications (1923) 80; W. A. Paton and R. A. Stevenson, Principles of Accounting (1918) 491–505.

ent value of the property consumed.[12] Much that I said about valuation in *Southwestern Bell Tel. Co.* v. *Pub. Serv. Comm.*, 262 U. S. 276, 289 and *St. Louis & O'Fallon R. Co.* v. *United States*, 279 U. S. 461, 488 applies to the depreciation charge. But acceptance of the doctrine of *Smyth* v. *Ames* does not require that the depreciation charge be based on present value of plant. For, an annual depreciation charge is not a measure of the actual consumption of plant during the year. No such measure has yet been invented. There is no regularity in the development of depreciation. It does not proceed in accordance with any mathematical law. There is nothing in business experience, or in the training of experts, which enables man to say to what extent service life will be impaired by the operations of a single year, or of a series of years less than the service life.[13]

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[12] If the depreciation charge measured the actual consumption of plant, the logic of this conclusion might seem forceful. It should be pointed out, therefore, that, apart from the fact developed in the text, that the charge does not measure the actual consumption of plant, the contention is specious. A business man investing in a long-lived plant does not expect to have its value returned to him in instalments corresponding to the loss of service life. The most that a continuing business like a street railway may expect is that, at the end of the service life, it shall be reimbursed with the then value of the original investment, or with funds sufficient to replace the plant. As will be shown presently, there is no basis for assuming that either the value of the original investment or the replacement cost will, at the end of the service life, equal or approximate the present value. See note 49, *infra*.

[13] "Depreciation of physical units used in connection with public utilities, or, indeed, with any other industries, does not proceed in accordance with any mathematical law. . . . There is no regularity in the development of the increasing need for repairs; there is no regularity in the progress of depreciation; but, in order to devise a reasonable plan for laying aside allowances from year to year to make good the depreciation as it accrues, and to provide for the accumulation of a sum equivalent to the cost less salvage of a unit by the time it is retired, some theory of depreciation progress must be assumed

Where a plant intended, like a street railway, for continuing operation is maintained at a constant level of efficiency, it is rarely possible to determine definitely whether or not its service life has in fact lessened within a particular year. The life expectancy of a plant, like that of an individual, may be in fact greater, because of unusual repairs or other causes, at the end of a particular year than it was at the beginning.[14] And even where it is known that there has been some lessening of service life within the year, it is never possible to determine with accuracy what percentage of the unit's service life has, in fact, been so consumed. Nor is it essential to the aim of the charge that this fact should be known. The main purpose of the charge is that irrespective of the rate of depreciation there shall be produced, through annual contributions, by the end of the service life of the depreciable plant, an amount equal to the total net expense of its retirement.[15]

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on which such allowances may be based." 81 Am. Soc. of Civil Eng. Transactions (1917), 1311, 1462–3. Compare E. A. Saliers, *op. cit.*, note 11, at p. 132.

[14] "In our valuation work they (the railroad companies) have consistently taken the position that no depreciation exists in a railroad property which is maintained in 100 per cent efficiency." Proposed Report of Interstate Commerce Commission on Telephone and Railroad Depreciation Charges, Docket No. 14700 and 15100, August 15, 1929, p. 20.

[15] Some contend "that where accruing depreciation is dependent, not upon lapse of time, but upon amount and extent of use, it is unscientific to provide for depreciation charges in equal annual installments, and that these charges should be made to correspond with units of use rather than of time. By relating the charges to units of use, they contend that the burden of the charges will be spread more equitably, to the financial advantage of the carrier, over alternating periods of light and heavy traffic." Proposed Report of the Interstate Commerce Commission, note 14, *supra*, p. 15. The practices of street railways differ in respect to the manner of laying the year's contribution to the depreciation reserve. Some lay a fixed percentage upon the gross revenues; some a number of cents per car mile; some a fixed percentage on the cost of the depreciable plant. Though ex-

To that end it is necessary only that some reasonable plan of distribution be adopted. Since it is impossible to ascertain what percentage of the service life is consumed in any year,[16] it is either assumed that depreciation proceeds at some average rate (thus accepting the approximation to fact customarily obtained through the process of averaging) or the annual charge is fixed without any regard to the rate of depreciation.

The depreciation charge is an allowance made pursuant to a plan of distribution of the total net expense of plant retirement. It is a bookkeeping device introduced in the exercise of practical judgment to serve three purposes. It preserves the integrity of the investment. Compare *Knoxville* v. *Knoxville Water Co.*, 212 U. S. 1, 13–14. It serves to distribute equitably throughout the several years of service life the only expense of plant retirement which is capable of reasonable ascertainment—the known cost less the estimated salvage value. And it enables those interested, through applying that plan of distribution, to ascertain, as nearly as is possible, the actual financial results of the year's operation. Many methods of calculating the amount of the allowance are used.[17] The charges to operating expenses in the several years and in the aggregate vary according to the method adopted.[18] But under none of these methods of fixing the depreciation charge is an attempt made to determine the percentage of actual consumption of plant falling within a par-

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pressed in different terms, the amount contemplated to be charged may in fact be based on cost. See, e. g., Re Elizabethtown Water Co., P. U. R. 1927E, 39.

[16] See testimony on rehearing of Telephone and Railroad Depreciation Charges, note 10, *supra*, A. B. Crunden, March 21, 1928 (Printed by American Tel. & Tel. Co.), pp. 108–9; Dr. M. R. Maltbie, June 27, 1928, transcript, p. 1396.

[17] See note 56, *infra*.

[18] See note 55, *infra*.

ticular year or within any period of years less than the service life.[19]

Third. The business device known as the depreciation charge appears not to have been widely adopted in America until after the beginning of this century.[20] Its use is still stoutly resisted by many concerns.[21] Wherever adopted, the depreciation charge is based on the original cost of the plant to the owner. When the great changes in price levels incident to the World War led some to

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[19] See E. A. Saliers, *op. cit.*, note 11, *supra*, at p. 132: "This method (reducing balance), . . . does not take into account either the actual rapidity with which depreciation occurs, or the various modifying factors which may show their influence at any time. Since this objection is common to all methods, other considerations will probably lead to a choice."

[20] The first case in which this Court expressly recognized a depreciation allowance as a part of operating expenses is *Knoxville* v. *Knoxville Water Co.*, 212 U. S. 1, 13, decided in 1909. In earlier cases cognizance was not taken of it. Compare *Union Pacific R. Co.* v. *United States*, 99 U. S. 402, 420; *United States* v. *Kansas Pacific R. Co.*, 99 U. S. 455, 459; *San Diego Land & Town Co.* v. *Jasper*, 189 U. S. 439, 446. See also *Lincoln Gas Co.* v. *Lincoln*, 223 U. S. 349, 363. Among street railways, the Milwaukee Electric Railway & Light Co. became the pioneer by adopting it in 1897. Others followed in 1905. 31 Street Ry. Journal 169–70; 687–8. In England, the adoption of the depreciaton charge had been hastened by a provision in the income tax law. Customs and Inland Revenue Act 1878, 41 Vict. c. 15, § 12. Massachusetts Acts 1849, c. 191, provided that the annual report required of railroads should give full information on "Estimated depreciation beyond the renewals, viz: road and bridges, buildings, engines and cars." See also Act 1846, c. 251. But in Massachusetts, as elsewhere in the United States, depreciation charges have not been customary among railroads, except in respect to equipment, pursuant to the rule prescribed by the Interstate Commerce Commission in 1907.

[21] See Telephone and Railroad Depreciation Charges, 118 I. C. C. 295, 301–303; Proposed Report of August 15, 1929, note 14, *supra*, p. 5–12, 17–20; H. E. Riggs, Depreciation of Public Utility Properties (1922) 78–92.

question the wisdom of the practice of basing the charge on original cost, the Chamber of Commerce of the United States warned business men against the fallacy of departing from the accepted basis.[22] And that warning has been recently repeated: "When the cost of an asset, less any salvage value, has been recovered, the process of depreciation stops,—the consumer has paid for that particular item of service. There are those who maintain that the obligation of the consumer is one rather of replacement,—building for building, machine for machine. According to this view depreciation should be based on replacement cost rather than actual cost. The replacement theory substitutes for something certain and definite, the actual cost, a cost of reproduction which is highly speculative and conjectural and requiring frequent revision. It, moreover, seeks to establish for one expense a basis of computation fundamentally different from that used for the other expenses of doing business. Insurance is charged on a basis of actual premiums paid, not on the basis of probable premiums three years hence; rent on the amount actually paid, not on the problematical rate of the next lease, salaries, light, heat, power, supplies are all charged at actual, not upon a future contingent cost. As one writer has expressed it, 'The fact that the plant cannot be replaced at the same cost, but only at much more, has nothing to do with the cost of its product, but only with the cost of future product turned out by the subsequent plant.' As the product goes through your factory it should be burdened with expired, not anticipated, costs. *Charge depreciation upon actual cost less any salvage.*" [23]

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[22] See a pamphlet "Depreciation" issued on October 15, 1921, by the Fabricated Productions Department (now the Department of Manufacture) of the Chamber of Commerce of the United States.

[23] See pamphlet "Depreciation, Treatment in Production Costs," issued by Department of Manufacture, Chamber of Commerce of the United States, No. 512 (May, 1929), p. 7. In the Foreword it is said: "In presenting this treatise on depreciation, we have drawn

Such is today, and ever has been, the practice of public accountants.[24] Their statements are prepared in accordance with principles of accounting which are well established, generally accepted and uniformly applied. By

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not only on our own resources, but also have had the co-operation of many manufacturers, industrial engineers and accountants."

[24] (1904) H. L. C. Hall, Maufacturing Costs, 132; (1905) B. C. Bean, Cost of Production, 75–98; (1911) H. A. Evans, Cost Keeping and Scientific Management, 30–5; S. Walton and S. W. Gilman, Auditing and Cost Accounts (11 Modern Business) 63–70; F. E. Webner, Factory Costs, 171; (1913) R. H. Montgomery, Auditing Theory and Practice, 317–39, (1921 ed.) Vol. 1, p. 634; (1915) F. H. Baugh, Principles and Practice of Cost Accounting, 42, 46–51; (1916) C. H. Scovell, Cost Accounting and Burden Application, 81–9; (1918) H. C. Adams, American Railway Accounting, 99–100, 279; R. B. Kester, Accounting Theory and Practice, Vol. 2, 99–209, 202; (1920) I. A. Berndt, Costs, Their Compilation and Use in Management, 101–6; Hodge and McKinsey, Principles of Accounting, 74–5; J. F. Sherwood, Public Accounting and Auditing, Vol. 1, 145–54; (1921) DeW. C. Eggleston and F. B. Robinson, Business Costs, 294–304; G. S. Armstrong, Essentials of Industrial Costing, 169–79; D. E. Burchell, Industrial Accounting, Series 1, No. 3, I, A. 2.d.(3); (1922) G. E. Bennett, Advanced Accounting, 212–34, 219; (1923) P. M. Atkins, Industrial Cost Accounting for Executives, 119–22; E. J. Borton, Cost Accounting Principles and Methods, 82–3; (1924) J. H. Bliss, Management Through Accounts, 304–14; W. H. Bell, Auditing, 232–40; H. P. Cobb, Shoe Factory Accounting and Cost Keeping, 232–40; C. B. Couchman, The Balance Sheet, 22–3, 49–56, 201–3; J. L. Dohr, Cost Accounting Theory and Practice, 378–87, 380; F. W. Kilduff, Auditing and Accounting Handbook, 380; E. L. Kohler and P. W. Pettengill, Principles of Auditing, 112–14; W. B. Lawrence, Cost Accounting, 308–10; A. B. Manning, Elements of Cost Accounting, 80; C. H. Scovell, Interest As A Cost, 83–4; F. E. Webner, Factory Overhead, 227; (1925) D. F. Morland and R. W. McKee, Accounting for the Petroleum Industry, 43–53; (1926) R. E. Belt, Foundry Cost Accounting, 240–3; DeW. Eggleston, Auditing Procedure, 319–20; (1927) S. Bell, Practical Accounting, 130–43; T. A. Budd and E. N. Wright, The Interpretation of Accounts, 195, 251–63, 253; H. R. Hatfield, Accounting, 145–6; (1928) C. R. Boland, Shoe Industry Accounting, 158–9; H. E. Gregory, Accounting Reports in Business Management, 158, 164–6; W. H. Heming-

those accustomed to read the language of accounting a depreciation charge is understood as meaning the appropriate contribution for that year to the amount required to make good the cost of the plant which ultimately must be retired. On that basis, public accountants certify to investors and bankers the results of operation, whether of public utilities, or of manufacturing or mercantile concerns. Corporate securities are issued, bought and sold, and vast loans are made daily, in reliance upon statements so prepared. The compelling logic of facts which led business men to introduce a depreciation charge has led them to continue to base it on the original cost of the plant despite the great changes in the price level incident to the World War. Basing the depreciation charge on cost is a rule prescribed or recommended by those associations of business men who have had occasion since the World War to consider the subject.[25]

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way, The National Financial Statement Interpreter, § 12, pp. 13–20; G. A. Prochazka, Accounting and Cost Finding for the Chemical Industries, 206–11; (1929) A. H. Church, Manufacturing Costs and Accounts, 5, 205ff; R. H. Montgomery, Auditing (Revision by W. J. Graham), 116–9; T. H. Sanders, Industrial Accounting, 144–5. See E. A. Saliers, Depreciation, Principles and Applications (1923) 56, 410, 425. At the Fourth International Cost Conference of the National Association of Cost Accountants held in Buffalo, N. Y., Sept. 10–13, 1923, the question whether depreciation charges should be based on original cost or replacement value was debated. On a vote at the close of the debate "nearly all rose" in favor of original cost. N. A. C. C. Yearbook 1923, pp. 183–201 at 201. The rule is the same in England. E. W. Newman, The Theory and Practice of Costing (1921) 20.

[25] National Coal Association, Annual Meeting at Chicago, May 21–23, 1919, Report and Suggestions of Committee on Standard System of Accounting and Analysis of Costs of Production, see also W. B. Reed, Bituminous Coal Mine Accounting, 1922, p. 119–126; Midland Club (Manufacturing Confectioners, Chicago) Official Cost Accounting and Cost Finding Plan, 1919, p. 43; United Typothetae of America: Standard Cost Finding System, pp. 4, 7, Treatise On

Business men naturally took the plant at cost, as that is how they treat other articles consumed in operation. The plant, undepreciated, is commonly carried on the books at cost; and it is retired at cost. The net profit or

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The Practical Accounting System for Printers, 1921, p. 15, The Standard Book on Cost Finding by E. J. Koch, published by U. T. of A., pp. 13–14, Treatise on the Standard Accounting System for Printers, Interlocking With the Standard Cost Finding System, 1920, pp. 44–45; Tanners' Council: Uniform Cost Accounting System for the Harness Leather Division of the Tanning Industry, officially adopted Dec. 1, 1921, p. 31, Uniform Cost Accounting System for the Sole and Belting Leather Division of the Tanning Industry, 1921, p. 31, Uniform Cost Accounting System for the Calf, Kip, and Side Upper; Glove, Bag, and Strap; and Patent Leather Divisions of the Tanning Industry, 1922, pp. 35, 48, Uniform Cost Accounting System for the Goat and Cabretta Leather Division of the Tanning Industry, 1922, p. 27; National Retail Coal Merchants Association, Complete Uniform Accounting System for Retail Coal Merchants, 1922, Account A–120, p. 6; The Associated Knit Underwear Manufacturers of America, Cost Control for Knit Underwear Factories, 1924, p. 52; National Knitted Outerwear Association, Inc., Cost Accounting Manual for the Knitted Outerwear Industry (by W. Lutz), 1924, pp. 18–20; American Drop Forging Institute, Cost Committee, Essentials of Drop Forging Accounting, 1924, pp. 36–7; Rubber Association of America, Inc., Manual of Accounts and Budgetary Control for the Rubber Industry, by the Accounting Committee, 1926, pp. 70, 71, 75, 79, 82; Packing House Accounting, by Committee on Accounting of the Institute of American Meat Packers, 1929, p. 325; Cost Accounting for Throwsters, issued by Commission Throwsters' Division of The Silk Association of America, Inc., 1928, pp. 29–30; Cost Accounting for Broad Silk Weavers, issued by The Broad Silk Division of The Silk Association of America, Inc., 1929, pp. 44–45. As there stated: "The use of replacement cost as a basis for depreciation charges has been eliminated due to the following reasons: 1. Depreciation is charged to manufacturing cost to absorb the reduction in value of capital assets through the effect of use and time. It does not represent an accumulation for the purpose of acquiring assets in the future. 2. The replacement cost theory is impractical because it would require a constant revaluation of assets. It is, furthermore, unlikely that any manufacturer would

loss of a business transaction is commonly ascertained by deducting from the gross receipts the expenditures incurred in producing them. Business men realized fully that the requirements for replacement might be more or less than the original cost. But they realized also that to attempt to make the depreciation account reflect economic conditions and changes would entail entry upon new fields of conjecture and prophecy which would defeat its purposes. For there is no basis in experience which can justify predicting whether a replacement, renewal or substitution falling in some future year will cost more or less than it would at present, or more or less than the unit cost when it was acquired.

The business men's practice of using a depreciation charge based on the original cost of the plant in determining the profits or losses of a particular year has abundant official sanction and encouragement. The practice was prescribed by the Interstate Commerce Commission in 1907,[26] when, in coöperation with the Association of American Railway Accounting Officers, it drafted the rule, which is still in force,[27] requiring steam railroads to make

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rebuild the same plant ten years after its construction. 3. The depreciation charge absorbed in the cost of the product represents a charge for the use of present manufacturing facilities and cannot have any connection with assets to be acquired in the future. The depreciation charge on new and more efficient equipment to be acquired in the future may be higher and, perhaps, offset by a general reduction in manufacturing cost per unit. It is not logical to base all other cost elements on present expenses and make the one exception in the case of depreciation." (P. 45.)

[26] Classification of Operating Expenses as Prescribed by the Interstate Commerce Commission, Third Revised Issue, 1907, pp. 10–12, 38, 44–51.

[27] Classification of Operating Revenues and Operating Expenses of Steam Roads Prescribed by the Interstate Commerce Commission, Issue of 1914, pp. 59, 61–8. Cf. Special Instructions 8, *Id.* p. 33.

an annual depreciation charge on equipment. It has been consistently applied by the Federal Government in assessing taxes on net income and corporate profits;[28] and by the tax officials of the several States for determining the net profits or income of individuals and corporations.[29] Since 1911, it has been applied by the United States Bureau of the Census.[30] Since 1915, it has been recommended

[28] Act of Oct. 3, 1913, c. 16, § II, B, 38 Stat. 114, 167, United States Internal Revenue Regulations No. 33, Jan. 5, 1914, Art. 129–146, p. 69–73; Act of Sept. 8, 1916, c. 463, § 5(a) and 6(a), 39 Stat. 756, 759, 760, Regulations No. 33 (Revised 1918), Art. 159–165, pp. 80–82; Act of Feb. 24, 1919 (Revenue Act of 1918), c. 18, § 214(a), par. (8) & (10), § 234(a), par. (7) & (9), 40 Stat. 1057, 1067–8, 1078, Regulations 45, Art. 161–171, pp. 62–66; Act of Nov. 23, 1921, c. 136, § 214(a), par. (8) & (10), and § 234(a), par. (7) & (9), 42 Stat. 227, 240, 241, 255, 256, Regulations 62, Art. 161–171, pp. 74–78; Act of June 2, 1924, c. 234, § 214(a), par. (8) & (9) and § 234(a), par. (7) & (8), 43 Stat. 253, 270–1, 284–5, Regulations 65, Art. 161–171, pp. 54–58; Act of Feb. 26, 1926, c. 27, § 214(a), par. (8) & (9) and § 234(a), par. (7) & (8); 44 Stat. (Part 2), 9, 27, 42–3, Regulations 69, Art. 161–170, pp. 56–60; Act of May 29, 1928, c. 852, § 23, par. (k) & (l), § 113 & 114, 45 Stat. 791, 800, 818, 821, Regulations 74, Art. 201–210, pp. 51–56. See also Bureau of Internal Revenue, Bulletin "F," Income Tax, Depreciation and Obsolescence (1920) 18; Outline For The Study of Depreciation and Maintenance, prepared by the Bureau of Internal Revenue (1926).

[29] N. L. McLaren & V. K. Butler, California Tax Laws of 1929, 117ff; Prentice-Hall Massachusetts State Tax Service (Personal) 1926–28 paragraphs 13875–7, p. 13559; Mississippi Income Tax Law of 1924, (Issued by State Tax Commission), § 12(a) (8), Regulations No. 1 (1925), Art. 136–8, pp. 52–3; New York State Tax Commission Income Tax Bureau, Manual 22 (1922), Art. 171–6, p. 35–6, Manual 25 (1925), Art. 171–6, pp. 33–4, C. C. H. 1928–29, Personal Income Tax, par. 4511, p. 2793; G. R. Harper, A Digest of the Oregon State Income Tax Act and Regulations (1924), 18; Wisconsin Tax Service (Henry B. Nelson, Inc.), 1929, Vol. 1, pp. 163–4.

[30] Uniform Accounts for Systems of Water Supply, arranged by the U. S. Bureau of the Census, American Water Works Association and Others (1911) 27.

by the Department of Agriculture.[31] Since 1917 by the Bureau of Mines.[32] In 1916, it was adopted by the Federal Trade Commission in recommendations concerning depreciation issued to manufacturers.[33] In 1917, it was prescribed by the United States Fuel Administration,[34] and by the War Ordnance Department.[35] In 1918, by the Air Craft Production Board.[36] In 1921, it was prescribed by the Federal Power Commission;[37] and it is continued in the revised rules of 1928.[38] In 1923, it was adopted by the depreciation section of the Interstate Commerce Commission in the report of tentative conclusions concerning depreciation charges submitted to the

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[31] U. S. Department of Agriculture, Bulletin 178, March 1, 1915, Cooperative Organization Business Methods, pp. 13–14; Bulletin 236, May 1, 1915, A System of Accounts for Farmers' Cooperative Elevators, p. 16; Bulletin 225, May 7, 1915, A System of Accounting for Cooperative Fruit Associations, p. 20; Bulletin 362, May 6, 1916, A System of Accounts for Primary Grain Elevators, p. 17; Bulletin 590, Feb. 27, 1918, A System of Accounting for Fruit Shipping Organizations, p. 23; Bulletin 985, A System of Accounting for Cotton Ginneries, 23, 27.

[32] Department of the Interior, Bureau of Mines, Bulletin 158, Petroleum Technology 43, Cost Accounting for Oil Producers, 1917, pp. 111–112; Technical Paper 250, Metal Mine Accounting, 1920, p. 26.

[33] Federal Trade Commission, Fundamentals of a Cost System for Manufacturers, July 1, 1916, 12–13.

[34] U. S. Fuel Administration, A System of Accounts for Retail Coal Dealers, Nov. 1, 1917, p. 17.

[35] War Department, Office of The Chief of Ordnance, Form 2941, Definition of "Cost" Pertaining to Contracts, June 27, 1917, pp. 9–11.

[36] Bureau of Air-Craft Production, General Ruling No. 28, May 3, 1918, of the Rulings Board of the Finance Department to the effect that in cost plus contracts depreciation must be based on original cost and "In no case shall depreciation be based on the cost of reproduction at present prices." See E. A. Saliers, *op. cit.*, note 11, p. 56.

[37] Rules and Regulations Governing the Administration of the Federal Water Power Act (1921), Regulation 16.

[38] Rules and Regulations Governing the Administration of the Federal Water Power Act (1928), Regulation 16, pp. 31–36.

steam railroads, telephone companies and carriers by water,[39] pursuant to paragraph 5 of § 20, of the Interstate Commerce Act, as amended by Transportation Act, 1920.[40] On November 2, 1926, it was prescribed by the Commission in *Telephone and Railroad Depreciation Charges*, 118 I. C. C. 295. A depreciation charge based on original cost has been uniformly applied by the public utility commissions of the several States when determining net income, past or expected, for rate-making purposes.[41]

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[39] Bureau of Accounts, Depreciation Section, Report of the Preliminary Investigation of Depreciation Charges in Connection with Steam Roads and the Tentative Conclusions and Recommendations of the Depreciation Section for the Regulation of Such Charges, Docket No. 15100, Aug. 23, 1923, pp. 11–13; Same for Telephone Companies, Docket No. 14700, March 10, 1923, pp. 6, 18–21.

[40] Act of Feb. 28, 1920, c. 91, 41 Stat. 456, 493.

[41] *Illinois*—Re Middle States Telephone Co., P. U. R. 1929B, 390, 396; Re Dixon Water Co., P. U. R. 1929B, 403, 408; Re Vermont Telephone & Exchange Co., P. U. R. 1929B, 411, 415; Re East St. Louis & Interurban Water Co., P. U. R. 1928A, 57, 68; Re Pekin Water Works Co., P. U. R. 1928C, 266, 276; Re Kinloch-Bloomington Tel. Co., P. U. R. 1927E, 135, 142; *Indiana*—Re Home Tel. Co. of Elkhart County, P. U. R. 1928A, 445, 455; Re Logansport Home Tel. Co., P. U. R. 1928E, 714, 725; Re Butler Tel. Co., P. U. R. 1925A, 240, 242, P. U. R. 1927C, 800, 804; *Minnesota*—Re Duluth Ry. Co., P. U. R. 1927A, 41, 52, 55; *Missouri*—Re Capital City Water Co., P. U. R. 1928C, 436, 460–1; Re Clinton County Telephone Co., P. U. R. 1928B, 796, 807; Re Capital City Water Co., P. U. R. 1925D, 41, 56, 57; *Nebraska*—Re Platte Valley Tel. Corp., P. U. R. 1928C, 193, 200; Re Meadow Grove Tel. Co., 1928D, 472, 477; Re Madison Tel. Co., P. U. R. 1929B, 385, 389; *New Jersey*—Re Elizabethtown Water Co., P. U. R. 1927E, 39, 63; Re Coast Gas Co., P. U. R. 1923A, 349, 366; *New York*—Baird *v.* Burleson, P. U. R. 1920D, 529, 538; *Utah*—Re Big Spring Electric Co., P. U. R. 1927A, 655, 665–7; *Wisconsin*—Re Wisconsin-Minnesota Light & P. Co., P. U. R. 1920D, 428, 433–5; Milwaukee Electric Ry. & Light Co. *v.* Milwaukee, P. U. R. 1918E, 1, 58; but see Re Wisconsin Telephone Co., P. U. R. 1928B, 434; *West Virginia*—Re Cumberland & Allegheny Gas Co., P. U. R. 1928B, 20, 80; Re Clarksburg Light & Heat Co., P. U. R. 1928B, 290, 322–325; Re Pittsburgh & W. Va. Gas Co., P. U. R. 1927D, 844, 851;

Fourth. In 1927 the business men's practice of basing the depreciation charge on cost was applied by this Court in *United States* v. *Ludey,* 274 U. S. 295, 300–301, a federal income tax case, saying: "The amount of the allowance for depreciation is the sum which should be set aside for the taxable year, in order that, at the end of the use-

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South Carolina—Re Rock Hill Tel Co., P. U. R. 1928E, 221, 230, "We are of opinion that the cost of the property is the only possible reasonable authority upon which depreciation can be calculated. Depreciation is a reserve to equalize retirements and not a reserve to equalize replacements. A rate of depreciation based upon original cost, even, is little more than an intelligent guess; but based upon reproduction costs is the blindest kind of speculation. With the known original cost of a unit and an engineer's estimate of its service life and salvage value, . . . some semblance of accuracy might be reached. To guess its service life and salvage value is bad enough but who would venture to guess what it would cost to reproduce it ten or twenty years thereafter. . . . Depreciation reserve is intended to keep the investment level but not to insure the hazards of varying future."

In its second report in the instant case the Commission said: "The plan of providing for retirements at cost is that followed by the Interstate Commerce Commission and the utility regulatory commissions of most of the states, and by all other utilities under the jurisdiction of this Commission." P. U. R. 1929A, 180, 181.

The cost basis is required in the following classifications of accounts prescribed by the Commissions of: *Colorado*—Uniform System of Accounts for electric light and power utilities, 1915, account no. 351, pp. 29–30, account no. 775, pp. 67–68; Uniform System of Accounts for gas utilities, 1916, account no. 351, p. 28, account no. 775, pp. 56–57; Uniform System of Accounts for water utilities, 1920, account no. 351, pp. 25–26, account no. 775, pp. 65–66; *California*—Uniform Classification of Accounts for telephone companies, 1913, pp. 54–55; for water corporations, 1919, pp. 14–15, account no. 29; for gas corporations, 1915, account no. 29, p. 15; for electric corporations, 1919, account no. 29, p. 15; *Connecticut*—Uniform System of Accounts for water companies, 1922, account no. 180, p. 17; *Georgia*—Uniform System of Accounts for telephone companies, 1920, pp. 6–7, account no. 12, p. 12, account no. 19, p. 16; *Idaho*—Uniform System of Accounts for water corporations, 1914, account 402, pp. 92–93; account W6, p. 10; for electric light and power companies, 1914, account 54,

ful life of the plant in the business, the aggregate of the sums set aside will (with the salvage value) suffice to provide an amount equal to the original cost." [42] I know of nothing in the Federal Constitution, or in the decisions of this Court, which should lead us to reject, in determining net profits, the rule sanctioned by the universal practice of business men and governmental departments. For, whether the expense in plant consumption can be more

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p. 29, account 215, p. 95; *Indiana*—Uniform System of Accounts for water utilities, 1920, account 370, p. 52, account 335, p. 82; for electric utilities, 1920, account 297, p. 73, account 309, p. 46; for heating utilities, 1920, account 22, p. 18, and account 118, p. 35; for electric railways, 1913, pp. 52–53; *Kansas*—Uniform System of Accounts for class D telephone companies, 1920, p. 4; *Massachusetts*—Uniform System of Accounts for gas and electric companies, 1921, account G678, p. 96, E678, p. 118, also pp. 27–28; *Minnesota*—Uniform System of Accounts for telephone companies class C and D, 1918, accounting circular no. 52, account 360, pp. 24–25; *Missouri*—Uniform System of Accounts for class D telephone corporations, Public Service Commission General Order No. 22, 1918, pp. 9–10; *Montana*—Uniform Classification of Accounts for gas utilities, 1913, pp. 20–21, 35; for electric utilities (undated but after 1919), pp. 25, 42–43; for telephone utilities, 1913, pp. 22, 35; for water utilities (undated but after 1919), 26, 42; for street railways, 1913, 26, 41; *New Hampshire*—Uniform Classification of Accounts for gas utilities, Accounting Circular No. 2, 1914, account 220, p. 88, account 98, pp. 53–4; *New Jersey*—Uniform System of Accounts for electric light, heat and power utilities, 1915, account 215, pp. 26–27, account 494, p. 77; for street or traction railway utilities, 1919, p. 18 (the accounts here are called "Accrued Amortization of Capital" and "General Amortization" instead of "Depreciation Reserve" and "Depreciation Account" or "Expense"); *Pennsylvania*—Uniform Classification of Accounts for common carriers by motor vehicle, Class A, 1928, account 179, p. 31-32; class B, 1928, account 179, p. 26; class C, 1928, p. 20. No information has been found about the practice in the States not listed.

[42] The Railways must hereafter assume the anomalous position of classing the additional $755,116 as an operating expense in its report to the Commission, and as part of its net income, in its income tax returns.

nearly approximated by using a depreciation charge based on original cost or by one based upon fluctuating present values is a problem to be solved, not by legal reasoning, but by the exercise of practical judgment based on facts and business experience. Cf. *Groesbeck* v. *Duluth, South Shore &c. Ry. Co.*, 250 U. S. 607, 614–15. The practice of using an annual depreciation charge based on original cost [43] when determining for purposes of investment, taxation or regulation, the net profits of a business, or the return upon property, was not adopted in ignorance of the rule of *Smyth* v. *Ames*, 169 U. S. 466. That decision, rendered in 1898, antedates the general employment of public accountants; [44] and also antedates the general introduction here of the practice of making a depreciation charge. The decision of the Court of Appeals of Maryland here under review, as well as *State ex rel. Hopkins* v. *Southwestern Bell Tel. Co.*, 115 Kan. 236 [45] and *Michigan Public Utilities Commission* v. *Michigan State Tel. Co.*, 228 Mich. 658, [46] were all decided after this Court reaffirmed the rule

[43] When original cost is not known, or when property is acquired in some unusual way not involving purchase, some other base must, of course, be taken. But it is always a stable one. Original cost, as used in this opinion includes other such stable bases. Compare Revenue Act of 1928, Act of May 29, 1928, ch. 852, Sec. 113, 45 Stat. 791, 818; Interstate Commerce Commission rules cited in notes 26 and 27, *supra*.

[44] The first American statute providing for examination of accountants and the use of the title C. P. A. was enacted by New York in 1896. Accountants' Handbook, edited by E. A. Saliers, p. 1326.

[45] In that case, the Special Commissioner to whom the case was referred, stated in his opinion (printed as an Appendix to the opinion of the Supreme Court, pp. 271-322, at p. 292), that if the return is figured on the present value of the utility's property, then the depreciation allowance must also be so figured. The Supreme Court did not mention this question in its opinion.

[46] The Michigan Supreme Court made a statement similar to that of the Special Commissioner in the Kansas case, but did not disturb the finding of the Commission. The court made no reference to the insurmountable practical difficulties presented.

of *Smyth* v. *Ames* in *Southwestern Bell Telephone Co.* v. *Public Service Commission,* 262 U. S. 276. But since this decision, as before, the Bell Telephone companies have persisted in basing their depreciation charges upon the original cost of the depreciable property, *Board of Public Utility Comm'rs.* v. *New York Tel. Co.,* 271 U. S. 23, 27. And they have insisted that the order of the Interstate Commerce Commission requiring a depreciation charge, 118 I. C. C. 295, should be so framed as to permit the continuance of that accounting practice.[47] The protest of the railroads, in that proceeding, against basing the charge on cost was made for the first time in 1927, in their petitions for a rehearing. And this protest came only from those who insist that no depreciation charge whatsoever shall be made.[48]

To use a depreciation charge as the measure of the year's consumption of plant, and at the same time reject original cost as the basis of the charge, is inadmissible.

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[47] Telephone and Railroad Depreciation Charges, 118 I. C. C. 295, 301; testimony on behalf of the Bell System Companies, upon rehearing, March 19, 20, 21, 1928 (printed by American Tel. & Tel. Co.), pp. 6, 11–13, 98. See their brief submitted on original argument, p. 48: "The amount of the depreciation expense is the cost of the property used up; that is, it is the dollars consumed. Therefore it is the cost less the salvage realized at retirement." Also original record, May 1, 1923, pp. 12, 13, 20; Proposed Report of August 15, 1929, p. 14; Preliminary Report of Depreciation Section, Docket No. 14700, note 39, *supra,* pp. 6–7.

[48] In Telephone and Railroad Depreciation Charges, 118 I. C. C. 295, 344, the Commission said: "It is agreed by all that depreciation should be based primarily upon the original cost to the accounting company of the unit of property in question." In the petition for rehearing filed by the Presidents' Conference Committee on Valuation, however, it was stated, p. 15: "Consideration should be given to the question of whether accounting depreciation, as the order conceives it, should be estimated upon the basis of original cost or of present value, . . ." A similar statement is made for the first time in the petition for rehearing filed by the New York Central lines, at p. 5.

It is a perversion of this business device. No method for the ascertainment of the amount of the charge yet invented is workable if fluctuating present values be taken as the basis. Every known method contemplates, and is dependent upon, the accumulation or credit of a fixed amount in a given number of years. The distribution of plant expense expressed in the depreciation charge is justified by the approximation to the fact as to the year's plant consumption which is obtained by applying the doctrine of averages. But if fluctuating present values are substituted for original cost there is no stable base to which the process of averaging can be applied. For thereby the only stable factor involved in fixing a depreciation charge would be eliminated. Each year the present value may be different. The cost of replacement at the termination of the service life of the several units or of the composite life cannot be foretold.[49] To use as a measure of the year's consumption of plant a depreciation charge based on fluctuating present values substitutes conjecture for experience. Such a system would require the consumer of today to pay for an assumed operating expense which has never been incurred and which may never arise.

The depreciation charge is frequently likened to the annual premium in legal reserve life insurance. The life

[49] In part, costs and values in the several future years will depend upon the general price level. As to this, even the economist can know nothing, save how the general price level has heretofore fluctuated from year to year; and that periods of rising prices have ever been followed by periods of falling prices. But cost and value in the several future years will depend in part upon factors other than the general price level. Even if the general price level for every future year were known, it would still be impossible to predict with reasonable accuracy the then cost or value of a unit then to be replaced, renewed or retired. For despite a higher general price level, the part might be procurable at smaller costs, by reason of economies introduced in its manufacture and changes in the methods and means of performing the work. See Excess Income of St. Louis & O'Fallon R. Co., 124 I. C. C. 3, 29, 41.

insurance premium is calculated on an agreed value of the human life—comparable to the known cost of plant—not on a fluctuating value, unknown and unknowable. The field of life insurance presented a problem comparable to that here involved. Despite the large experience embodied in the standard mortality tables and the relative simplicity of the problem there presented, the actual mortality was found to vary so widely from that for which the premiums had provided, that their rate was found to work serious injustice either to the insurer or to the insured. The transaction resulted sometimes in bankruptcy of the insurer; sometimes in his securing profits which were extortionate; and rarely, in his receiving only the intended fair compensation for the service rendered. Because every attempt to approximate more nearly the amount of premium required proved futile, justice was sought and found in the system of strictly mutual insurance. Under that system the premium charged is made clearly ample; and the part which proves not to have been needed enures in some form of benefit to him who paid it.

Similarly, if, instead of applying the rule of *Smyth* v. *Ames,* the rate base of a utility were fixed at the amount prudently invested, the inevitable errors incident to estimating service life and net expense in plant consumption could never result in injustice either to the utility or to the community. For, if the amount set aside for depreciation proved inadequate and investment of new capital became necessary, the utility would be permitted to earn a return on the new capital. And if the amount set aside for depreciation proved to be excessive, the income from the surplus reserve would operate as a credit to reduce the capital charge which the rates must earn. If the Railways should ever suffer injustice from adopting cost of plant as the basis for calculating the depreciation charge, it will be an unavoidable incident of applying in valuation the rule of *Smyth* v. *Ames.* This risk, if it

exists, cannot be escaped by basing the charge on present value. For this suggested escape, besides being entirely conjectural, is instinct with certainty of injustice either to the community or the Railways. The possibility of such injustice admonishes us, as it did in deciding the constitutional questions concerning interstate commerce, *Foster-Fountain Packing Co.* v. *Haydel,* 278 U. S. 1, 10, *Federal Trade Comm'n* v. *Pacific Paper Ass'n,* 273 U. S. 52, 64, and taxation, *Mountain Timber Co.* v. *Washington,* 243 U. S. 219, 237; *Shaffer* v. *Carter,* 252 U. S. 37, 55; *Farmers Loan & Trust Co.* v. *Minnesota, ante,* p. 204, decided this day, that rate regulation is an intensely practical matter.

Fifth. Public officials, investors and most large businesses are convinced of the practical value of the depreciation charge as a guide to knowledge of the results of operation. Many States require public utilities to make such a charge.[50] But most railroads, some gas and electric

[50] *Alabama*—Code of 1928, § 9769, p. 1758; *Arizona*—Revised Stat. 1913 (Civil Code), Tit. 9, § 2325, p. 807; *California*—Deering, Gen. Laws, 1923, Vol. 2, Act 6386, § 49, p. 2721; *Colorado*—Comp. L. 1921, § 2945, p. 928; *Idaho*—Comp. Stat. 1919, Vol. 1, § 2473, p. 703; *Illinois*—Cahill's Rev. Stat. 1929, ch. 111a, § 29, p. 2045; *Indiana*—Burns Ann. Stat. 1926, Vol. 3, § 12693–12696, p. 1245; *Massachusetts*—Acts 1921, ch. 268, § 1, p. 308, inserting new section 5A after § 5, Mass. Gen. L. 1921, p. 1624; Gen. L. 1921, Vol. 2, ch. 164, § 57, p. 1818; *Minnesota*—Gen. Stat. 1923, § 5305, p. 733, Mason's Stat. 1927, § 5305, p. 1107; *Missouri*—Rev. Stat. 1919, §§ 10470, 10488 and 10512, pp. 3250, 3266, 3283; *Nebraska*—Constitution Art. 10, § 5 (Comp. Stat. 1922, p. 96); *New Hampshire*—P. L. 1926, Vol. 2, ch. 240, §§ 9, 10 11, p. 936; *New Jersey*—1911–1924, Cum. Supp. to Comp. Stat. Vol. 2, *167–17(f), p. 2883; *Ohio*—Throckmorton's Ann. Code, 1929, §§ 614–49 and 614–50, p. 161; *Oregon*—Olson's Oreg. L. 1920, Vol. 2, § 6046, p. 2422; *Pennsylvania*—Stat. 1920 (West Pub. Co.), §§ 18066, 18146, pp. 1742, 1752; *Tennessee*—Shannon's Ann. Code, 1926 Supp., § 3059a88(c), p. 733; *Wisconsin*—Stat. 1925, 196.09, p. 1550. Most of these statutes require the maintenance of a separate depreciation fund. Some

companies and some other concerns, deny the propriety of making any annual depreciation charge.[51] They insist that the making of such a charge will serve rather to mislead than to aid in determining the financial result of the year's operations. They urge that the current cost of maintaining the plant, whether by repair, renewals or replacements, should be treated as a part of the maintenance account, at least in systems consisting of large and diversified properties intended for continuous operation and requiring a constant level of efficiency. They insist that, in such systems, retirements, replacements and renewals attain a uniform rate and tend to be equal each year; that, therefore, no great disproportion in revenues and operating expenses in the various years results if the whole expenditure made for renewals or replacements in any year is treated as an expense of operation of that year and the retirements of property are not otherwise reflected in any specific charge. They admit that it may be desirable to create a special reserve, to enable the company to spread the cost of retiring certain large units of property over a series of years, thus preventing a disproportionate burden upon the operations of a single year. But they say that such a reserve is not properly called a depreciation reserve. Moreover they contend that when a large unit is retired, not because it has been worn out but because some more efficient substitute has been found, the cost of retire-

require only a reserve. In Maryland, the Commission's power over accounting methods is held to include the power to require depreciation accounting, but not the maintaining of a separate fund. See *Havre de Grace Bridge Co.* v. *Public Service Comm'n,* 132 Md. 16.

[51] See note 21, *supra;* G. O. May, Carrier Property Consumed in Operation and the Regulation of Profits, 43 Q. J. Ec. 208–14; R. A. Carter and W. L. Ransom, Depreciation Charges of Railroads and Public Utilities, a memorandum filed with the depreciation section of the Bureau of Accounts of the Interstate Commerce Commission (1921).

ment should be spread over the future, so that it may fall upon those who will gain the benefit of the enhanced efficiency. Compare *Kansas City Southern R. Co.* v. *United States*, 231 U. S. 423, 440–441. Under the replacement method of accounting advocated by the railroads and others there is no depreciation charge and no depreciation reserve. Operating expenses are charged directly with replacements at their cost. This method does not concern itself with all retirements, but only with retirements which are replaced.[52]

Despite the seemingly unanswerable logic of a depreciation charge, they oppose its adoption, urging the uncertainties inherent in the predetermination of service life and of salvage value, and the disagreement among experts as to the most equitable plan of distributing the total net plant expense among the several years of service. They point out that each step in the process of fixing a depreciation charge is beset with difficulties, because of the variables which attend every determination involved. The first step is to estimate how long the depreciable plant will remain in service. Engineers calculate with certitude its composite service life by ap-

[52]A modification of the depreciation reserve method is the "retirement reserve" recommended by the National Association of Railroad and Utilities Commissioners. This reserve does not involve necessary periodic charges of specific amounts to operating expenses. To this reserve are credited "such amounts as are charged to the operating expense account . . . appropriated from surplus, or both, to cover the retirement loss represented by the excess of the original cost plus cost of dismantling, over the salvage value of fixed capital retired from service." To the operating expense, "Retirement Expense" are charged "amounts . . . in addition to amounts appropriated from surplus, to provide a reserve against which may be charged the original cost of all property retired from service, plus cost of dismantling, less salvage." Proceedings, 37th Ann. Convention, 1925, pp. 441, 458; 32nd Ann. Conv. 1920, Appendix 1, pp. 21, 76, 106, Appx. 2, pp. 21, 88.

plying weighted averages to the data concerning the several property units. But their exactitude is delusive. Each unit has its individual life dependent upon the effect of physical exhaustion, obsolescence, inadequacy and public requirement.[53] The physical duration of the life depends largely upon the conditions of the use; and these cannot be foretold. The process of obsolescence is even less predictable. Advances in the arts are constantly being made which would require retirement at some time, even if the unit were endowed with perpetual physical life. But these advances do not proceed at a uniform pace. The normal progress of invention is stimulated or retarded by the ever changing conditions

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[53] The adequacy of a depreciation charge depends, among other things, upon the liberality of the particular concern's practice in respect to maintenance, 81 Amer. Soc. Civil Eng. Transactions (1917), 1490; R. H. Montgomery, Auditing Theory And Practice (1921) Vol. 1, p. 625. It depends in part upon the scope of the causes of retirement to be covered by it. As to what is the proper scope, opinion differs widely. The telephone companies (Bell System) contend that the charge should cover all causes of retirement not provided for by ordinary maintenance charges, including extraordinary casualties like storm and fire. 118 I. C. C. 340. Others insist that the charge should not include any allowance for contingent or presently unascertainable obsolescence, inadequacy, changes in the art, public requirements, storm casualties, or extraordinary repairs or expense of similar character. 118 I. C. C. 341. Still others insist that the charge should cover only exhaustion due to wear and tear and lapse of time, collectively called superannuation, but not obsolescence, inadequacy and the like, which are said to be precipitate in their operation. The Proposed Report of the Interstate Commerce Commission on Telephone and Railroad Depreciation Charges, Docket Nos. 14700 and 15100, August 15, 1929, pp. 27–28, defines depreciation as "the loss in service value not restored by current maintenance and incurred in connection with the consumption or prospective retirement of property in the course of service from causes against which the carrier is not protected by insurance, which are known to be in current operation, and whose effect can be forecast with a reasonable approach to accuracy."

of business. Moreover, it is the practical embodiment of inventions which produces obsolescence; and business conditions determine even more largely the time and the extent to which new inventions are embodied in improved machines. The march toward inadequacy, as distinguished from obsolescence, is likewise erratic.

The protestants point out that uncertainty is incident also to the second step in the process of fixing the appropriate depreciation charge. A plant unit rarely remains in service until consumed physically. Scrap remains; and this must be accounted for, since it is the net expense of the exhaustion of plant which the depreciation charge is to cover. Such scrap value is often a very large factor in the calculation of plant expense.[54] The probable salvage on the unit when retired at the end of its service life must, therefore, be estimated. But its future value is never knowable.

And, finally, the protestants show that after the net expense in plant consumption is thus estimated, there remains the task of distributing it equitably over the assumed service life—the allocation of the amount as charges of the several years. There are many recognized methods for calculating these amounts, each method having strenuous advocates; and the amounts thus to be charged, in the aggregate as well as in the successive years, differ widely according to the method adopted.[55] Under the straight line method, the aggregate of the charges of the several years equals the net plant expense for the whole period of service life; and the charge is the

[54] In the case of telephone companies the value of the salvage recovered runs as high as 45 per cent. of the original cost of the property. Testimony of Dr. M. R. Maltbie, note 16, *supra*, pp. 1459–60.

[55] Thus, if a unit costs $100, has a service life of 25 years and no salvage value, and the rate of interest is 5 per cent., the charge to

same for all the years. Under the sinking fund method, the aggregate of the charges of the several years is less than the net plant expense for the whole period; because the proceeds of each year's charge are deemed to have been continuously invested at compound interest and the balance is assumed to be obtained from interest accumulations. Other methods of distributing the total charge produce still other results in the amount of the charges laid upon the operating expense of the several years of service.[56]

We have no occasion to decide now whether the view taken by the Interstate Commerce Commission in *Telephone and Railroad Depreciation Charges*, 118 I. C. C. 295, or the protest of the railroads, gas and electric com-

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operating expenses for depreciation in each of the following years would be:

Year	Under straight line method	Under sinking fund method	Under fixed percentage of diminishing value method	Under annuity method
5th	$4.00	$2.10	$8.05	$2.55
10th	4.00	2.10	3.21	3.25
15th	4.00	2.10	1.28	4.15
20th	4.00	2.10	.51	5.29
25th	4.00	2.10	.20	6.76
The aggregate of the charges in all the years at the end of the 25th year would be	100.00	52.38	99.00	100.00

See E. A. Saliers, *op. cit.*, note 11, *supra*, 144, 148, 154, 161.

[56] Other methods are: reducing balance; annuity; compound interest or equal annual payment; unit cost; working hour; sum-of-the year-digits. See E. A. Saliers, *op. cit.*, note 11, *supra*, 129–179; R. B. Kester, Accounting Theory and Practice (1918), Vol. 2, 150–186; J. B. Canning, The Economics of Accountancy (1929) 265–309; 81 Am. Soc. Civil Eng. Transactions (1917) 1463–1484.

panies should prevail.[57] For in neither event was the Court of Appeals justified in directing an increase in the allowance. The adequacy of a depreciation charge is dependent in large measure upon the practice of the individual concern with respect to its maintenance account. The Commission found that the Railways' property was well maintained and that the allowance of $883,544, together with the usual maintenance charges, would be adequate to keep the property at a constant level of efficiency. It found further, on the basis of the Company's experience, that the charges previously allowed had served "fairly well" to take care of current depreciation and retirements. The depreciation charge was established by the Railways in 1912 and was fixed by it, of its own motion, at 5 per cent. of the gross revenues. The charge at that rate had been continued ever since and had yielded each year an increasing sum. For the gross revenues had grown steadily. In the early years, they grew through increase of the number of passengers carried; since 1919, through the repeated increases in the rate of fare. In nearly every year, the allowance had exceeded the charges for retirements. After charging retirements,

[57] Nor need we express an opinion on the relation between a utility's depreciation reserve and the valuation of the accrued depreciation of its property. See Proposed Report of the Interstate Commerce Commission, note 14, *supra*, at pp. 20–24. While it is true that the annual depreciation charge does not purport to measure the current actual consumption of plant, it may be that the credit balance in the depreciation reserve is good evidence of the amount of accrued depreciation. See *New York Telephone Co.* v. *Prendergast*, 36 F. (2d) 54. It may also be that so much of the depreciation reserve as has not been used for retirements or replacements should be subtracted from the present value of the utility's property in determining the rate base, on the theory that the amounts thus contributed by the public represent a part payment for the property consumed or to be consumed in service. Compare Burns' Ann. Ind. Stat. (1926), Vol. 3, §§ 12693–12696, p. 1245. These matters are not involved in the case at bar and as to them no opinion is expressed.

whether replaced or not, to the reserve, there remained a credit, on August 31, 1927, of $1,413,793. The allowance of $883,544 is equal to 5 per cent. of the estimated gross revenues for 1928. The increase of this allowance for 1928 over that for 1914 was greater proportionately than the increase of the 1928 value of the Railways' property over its 1914 value.[58]

The estimated charge of $883,544 was thus clearly ample as the year's share of the expense of plant retirement based on cost. But even if the annual depreciation allowance could be made to correspond with the actual consumption of plant, there was nothing in the record to show that the value of the part of plant to be consumed in 1928 would exceed that amount. Nor is there anything in the record or in the findings to show that $883,544, together with the usual maintenance charges and under the improved methods of construction, would be inadequate to provide, at the prices then prevailing, for the replacements required in that year, and also for the year's contribution to a special reserve under the plan advocated by the railroads before the Interstate Commerce Commission. On the contrary, the Company's history [59] and the present advances in the street railway industry strongly indicate that, by employing new equipment of lesser value,[60] the Railways could render more efficient service at smaller operating costs. Neither the trial court nor the Court of Appeals made any finding on these matters. The Commission's finding that

[58] In determining the reproduction cost of the Company's depreciable property, the Commission applied an index figure of 1.54 to the 1914 value. P. U. R. 1926C, 441, 464. If the depreciation charge for 1914, $469,395, is multiplied by the same index figure, the product is $160,676 less than the allowance originally made for 1928. The additions to plant since 1914, $7,500,000, required a proportional increase in the depreciation charge of only $145,500.

[59] See Re United Rys. & Elec Co., P. U. R. 1928C, 604, 633–4.

[60] See 73 Electric Ry. Journal (1929) 693, 705, 758, 831, 843.

$883,544 was an adequate depreciation charge should, therefore, have been accepted by the Court of Appeals, whether the sum allowed be deemed a depreciation charge properly so called, or be treated as the year's contribution to a special reserve to supplement the usual maintenance charges.

It is clear that the management of the Railways deemed the charge of 5 per cent. of gross revenues adequate. On that assumption it paid dividends on the common stock in each year from 1923 through 1927.[61] If the addition to the depreciation charge ordered by the Court of Appeals was proper for the year 1928, it should have also been made in the preceding five years.[62] Upon such a recasting of the accounts, no profits were earned after 1924; and there was no surplus fund from which dividends could have been paid legally. If the contention now urged by the Railways is sound, the management misrepresented by its published accounts its financial condition and the results of operation of the several years; and it paid dividends in violation of law.[63]

MR. JUSTICE HOLMES joins in this opinion.

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[61] The Company was not, of course, restricted to a depreciation charge of 5 per cent. of gross revenues. That was only the amount which the Commission deemed adequate. But the Company was free to reserve a greater amount, without paying dividends, if it believed a greater amount was necessary. Cf. *Havre de Grace Bridge Co.* v. *Public Service Comm'n*, 132 Md. 16.

[62] The value of the depreciable property in each of the five years preceding 1928 was almost constant and at least equal to that in 1928, P. U. R. 1928C, 604, 639, P. U. R. 1929A, 180, 183.

[63] In each of those years annual dividends amounting to $818,448 were paid. The recorded surplus at the beginning of 1923 was $1,553,097.83. If the depreciation allowance contended for had been made in each of those years, this surplus would have been wiped out in 1925 and there would have remained a deficit, after payment of dividends of $416,568 in 1925, $1,027,837 in 1926, and $2,140,146 in 1927. Instead, the Railways reported a surplus of $2,005,473 at the

Opinion of MR. JUSTICE STONE.

I agree with what Mr. Justice Brandeis has said, both as to the propriety of excluding from the rate base the value of the franchise or easement donated to the Railway Company and with respect to the method of ascertaining depreciation. But of this I would say a further word.

I will assume, for present purposes, that as a result of *Smyth* v. *Ames*, 169 U. S. 466, the function of a depreciation account for rate making purposes must be taken to be the establishment of a fund for the replacement of plant rather than the restoration of cost or value of the original plant investment. But what amount annually carried to reserve will be sufficient to replace all the elements of a composite property purchased at various times, at varying price levels, as they wear out or become obsolete, is a question, not of law but of fact. It is a question which must be answered on the basis of a prediction of the salvage value of the obsolete elements, the character of the articles which will be selected to replace them when replacement is necessary, and their cost at the time of replacement.

Obviously, that question cannot be answered by *a priori* reasoning. Experience is our only guide, tempered by the consideration of such special or unusual facts and circumstances as would tend to modify the results of experience. Experience, which embraces the past fifteen years of high price levels, and the studies of experts, resulting in the universally accepted practice of account-

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end of 1925, $2,020,863 at the end of 1926 and $1,588,823 at the end of 1927. See Moody's Manual of Investments (Public Utilities) 1929, pp. 375–6; Poor's Public Utility Section 1929, p. 968. In declaring these dividends, the management did not overlook the necessity of adequate provision for depreciation. For, in the several rate cases before the Commission it had insisted that the depreciation allowances were inadequate.

ants and business economists, as recounted in detail by Mr. Justice Brandeis, have demonstrated that depreciation reserve, calculated on the basis of cost, has proven to be the most trustworthy guide in determining the amount required to replace, at the end of their useful life, the constantly shifting elements of a property such as the present. Costs of renewals made during the present prolonged period of high prices and diminishing replacement costs tend to offset the higher cost of replacing articles purchased in periods of lower prices. I think that we should be guided by that experience and practice in the absence of proof of any special circumstances showing that they are inapplicable to the particular situation with which we are now concerned.

Such proof, in the present case, is wanting. The only circumstance relied on for a different basis of depreciation, and one which is embraced in that experience, is the current high price level, which has raised the present reproduction value of the carrier's property, as a whole, above its cost. That, of course, might be a controlling consideration if we were dealing with present replacements or their present cost, instead of replacements to be made at various uncertain dates in the future, of articles purchased at different times in the past, at varying price levels. But I cannot say that since prices at the present moment are high, as a result of post-war inflation, a rate of return which is sufficient to yield 7.78 per cent. on present reproduction value, after adequate depreciation based on cost of the carrier's property, is confiscatory because logic requires the prediction that the elements of petitioner's property cannot, in years to come, be renewed or replaced with adequate substitutes, at less than the present average reproduction cost of the entire property—and this in the face of the facts that the cost of replacements in the past fifteen years has been for the most part at higher price levels than at present, that

the amount allowed by the Commission for depreciation has been in practice more than sufficient for all replacement requirements throughout the period of higher price levels, and that the Company has declared and paid dividends which were earned only if this depreciation reserve was adequate.

To say that the present price level is necessarily the true measure of future replacement cost is to substitute for a relevant fact which I should have thought ought to be established as are other facts, a rule of law which seems not to follow from *Smyth* v. *Ames,* and to be founded neither upon experience nor expert opinion and to be unworkable in practice. In the present case it can be applied only by disregarding evidence which would seem persuasively to establish the very fact to be ascertained.

INTERNATIONAL SHOE COMPANY *v.* FEDERAL TRADE COMMISSION.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

No. 42. Argued December 2, 3, 1929.—Decided January 6, 1930.

Section 7 of the Clayton Act forbids one corporation to acquire stock of another corporation (both being engaged in interstate commerce), where the effect of such acquisition may be to substantially lessen competition between them or to restrain such commerce in any section or community, and declares that it shall not apply to corporations purchasing such stock solely for investment and not using the same to bring about the substantial lessening of competition. *Held*:

(1) In a suit to enforce an order of the Federal Trade Commission requiring one corporation to divest itself of the stock of another alleged to have been acquired by the former in violation of this section, findings of the Commission that substantial competition existed between the two corporations at the time of such acquisition and that the effect of such acquisition was substantially to lessen such competition and to restrain interstate commerce, can not be accepted if not supported by the evidence. P. 297.

(2) The section forbids only such stock acquisitions as probably will result in lessening competition to a substantial degree, i. e., to such a degree as will injuriously affect the public, and is inapplicable where there was no pre-existing substantial competition to be affected. P. 297.

(3) In the present case, it is plain that the products of the two shoe-manufacturing companies in question, because of the difference in appearance and workmanship, appealed to the tastes of entirely different classes of consumers; that while a portion of the product of each company went into the same States, in the main the product of each was in fact sold to a different class of dealers and found its way into distinctly separate markets, so that, in respect of 95% of the business, there was no competition in fact and no contest, or observed tendency to contest, in the market for the same purchasers; and when this is eliminated, what remains is of such slight consequence as to deprive the finding that there was any substantial competition between the two corporations of any real support in the evidence. Pp. 296, 298.

(4) The existence of competition is a fact to be disclosed by observation rather than by the processes of logic; and the testimony of the officers of the corporation proceeded against that there was no real competition between it and the other in respect of the products in question, is to be weighed like other testimony to matters of fact, and, in the absence of contrary testimony or reason for doubting the accuracy of observation or the credibility of the witnesses, should be accepted. P. 299.

(5) In the case of a corporation with resources so depleted, and the prospect of rehabilitation so remote, that it faces the grave probability of a business failure with resulting loss to its stockholders and injury to the communities where its plants are operated, the purchase of its capital stock by a competitor (there being no other prospective purchaser), not with a purpose to lessen competition, but to facilitate the accumulated business of the purchaser and with the effect of mitigating seriously injurious consequences otherwise probable, is not in contemplation of law prejudicial to the public and does not substantially lessen competition or restrain commerce within the intent of the Clayton Act. P. 301.

29 F. (2d) 518, reversed.

CERTIORARI, 279 U. S. 832, to review a judgment of the Circuit Court of Appeals affirming on appeal an order of the Federal Trade Commission.

Mr. Charles Nagel, with whom *Messrs. Frank Y. Gladney, R. E. Blake,* and *J. D. Williamson* were on the brief, for petitioner.

Assistant to the Attorney General O'Brian, with whom *Solicitor General Hughes* and *Messrs. Charles H. Weston,* Special Assistant to the Attorney General, *Robert E. Healy,* Chief Counsel, Federal Trade Commission, and *Baldwin B. Bane,* Special Attorney, were on the brief, for respondent.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

This was a proceeding instituted by complaint of the Federal Trade Commission against petitioner charging a violation of § 7 of the Clayton Act, c. 323, 38 Stat. 730, 731 (U. S. C., Title 15, § 18), which provides:

"No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.

* * * * *

"This section shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition."

The complaint charges that in May 1921, while petitioner and the W. H. McElwain Company were engaged in commerce in competition with each other, petitioner acquired all, or substantially all, of the capital stock of the McElwain Company and still owns and controls the

same; that the effect of such acquisition was to substantially lessen competition between the two companies; to restrain commerce in the shoe business in the localities where both were engaged in business in interstate commerce; and to tend to create a monopoly in interstate commerce in such business. The last named charge has not been pressed and may be put aside. Upon a hearing before the commission evidence was introduced from which the commission found, (a) that the capital stock of the McElwain Company had been acquired by the petitioner at the time charged in the complaint, (b) that the two companies were at the time in substantial competition with one another, and (c) that the effect of the acquisition was to substantially lessen competition between them and to restrain commerce. Thereupon the commission put down an order directing petitioner to divest itself of all capital stock of the McElwain Company then held or owned, directly or indirectly, by petitioner, and to cease and desist from the ownership, operation, management and control of all assets acquired from the McElwain Company subsequent to the acquisition of the capital stock, etc., and to divest itself of all such assets, etc. Upon appeal by petitioner to the court below the order of the commission was affirmed. 29 Fed. (2d) 518.

The principal grounds upon which the order here is assailed are (1) that there never was substantial competition between the two corporations, and, therefore, no foundation for the charge of substantial lessening of competition; (2) that at the time of the acquisition the financial condition of the McElwain Company was such as to necessitate liquidation or sale, and, therefore, the prospect for future competition or restraint was entirely eliminated. Since, in our opinion, these grounds are determinative, we find it unnecessary to consider the challenge to the sufficiency of the complaint and other contentions.

First. Prior to the acquisition of the capital stock in question the International Shoe Company was engaged in manufacturing leather shoes of various kinds. It had a large number of tanneries and factories and sales houses located in several states. Its business was extensive, and its products were shipped and sold to purchasers practically throughout the United States. The McElwain Company, a Massachusetts corporation with its principal office in Boston, also manufactured shoes and sold and distributed them in several states of the Union. Principally, it made and sold dress shoes for men and boys. The International made and sold a line of men's dress shoes of various styles, which, although comparable in price, and to some degree in quality, with the men's dress shoes produced by the McElwain Company, differed from them in important particulars. Such competition as there was between the two companies related alone to men's dress shoes.

The findings of the commission that this competition between the two companies was substantial and, by the acquisition of the stock of the McElwain Company, had been substantially lessened, the Court of Appeals affirmed, holding that they were fully supported by the evidence. Upon a careful review of the record we think the evidence requires a contrary conclusion.

It is true that both companies were engaged in selling dress shoes to customers for resale within the limits of several of the same states; but the markets reached by the two companies within these states, with slight exceptions hereafter mentioned, were not the same. Certain substitutes for leather were used to some extent in the making of the McElwain dress shoes; and they were better finished, more attractive and modern in appearance, and appealed especially to city trade. The dress shoes of the International were made wholly of leather and were of a better wearing quality; but among the

retailers who catered to city or fashionable wear, the McElwain shoes were preferred. The trade policies of the two companies so differed that the McElwain Company generally secured the trade of wholesalers and large retailers; while the International obtained the trade of dealers in the small communities. When requested, the McElwain Company stamped the name of the customer (that is the dealer) upon the shoes, which the International refused to do; and this operated to aid the former company to get, as generally it did get, the trade of the retailers in the larger cities. As an important result of the foregoing circumstances, witnesses estimated that about 95 per cent. of the McElwain sales were in towns and cities having a population of 10,000 or over; while about 95 per cent. of the sales of the International were in towns having a population of 6,000 or less. The bulk of the trade of each company was in different sections of the country, that of the McElwain Company being north of the Ohio River and east of the State of Illinois, while that of the International was in the south and west. An analysis of the sales of the International for the twelve months preceding the acquisition of the McElwain capital stock, discloses that in 42 states no men's dress shoes were sold to customers of the McElwain Company; and that in the remaining six states during the same period a total of only 52-5/12 dozen pairs of such shoes had been sold to sixteen retailers and three wholesalers who were also customers of the McElwain Company. This amounted to less than one-fourth of the production of dress shoes by the International for a single day, the daily production being about 250 dozen pairs.

It is plain from the foregoing that the product of the two companies here in question, because of the difference in appearance and workmanship, appealed to the tastes of entirely different classes of consumers; that while a

portion of the product of both companies went into the same states, in the main the product of each was in fact sold to a different class of dealers and found its way into distinctly separate markets. Thus it appears that in respect of 95 per cent. of the business there was no competition in fact and no contest, or observed tendency to contest, in the market for the same purchasers; and it is manifest that, when this is eliminated, what remains is of such slight consequence as to deprive the finding that there was substantial competition between the two corporations, of any real support in the evidence. The rule to be followed is stated in *Federal Trade Comm'n* v. *Curtis Co.*, 260 U. S. 568, 580:

"Manifestly, the court must inquire whether the Commission's findings of fact are supported by evidence. If so supported, they are conclusive. But as the statute grants jurisdiction to make and enter, upon the pleadings, testimony and proceedings, a decree affirming, modifying or setting aside an order, the court must also have power to examine the whole record and ascertain for itself the issues presented and whether there are material facts not reported by the Commission. If there be substantial evidence relating to such facts from which different conclusions reasonably may be drawn, the matter may be and ordinarily, we think, should be remanded to the Commission—the primary fact-finding body—with direction to make additional findings, but if from all the circumstances it clearly appears that in the interest of justice the controversy should be decided without further delay the court has full power under the statute so to do. The language of the statute is broad and confers power of review not found in the Interstate Commerce Act."

Section 7 of the Clayton Act, as its terms and the nature of the remedy prescribed plainly suggest, was intended for the protection of the public against the evils

which were supposed to flow from the undue lessening of competition. In *Standard Oil Co.* v. *Federal Trade Commission,* 282 Fed. 81, 87, the Court of Appeals for the Third Circuit applied the test to the Clayton Act which had theretofore been held applicable to the Sherman Act, namely, that the standard of legality was the absence or presence of prejudice to the public interest by unduly restricting competition or unduly obstructing the due course of trade. In *Federal Trade Comm'n* v. *Sinclair Co.,* 261 U. S. 463, 476, referring to the Clayton Act and the Federal Trade Commission Act, this Court said:

"The great purpose of both statutes was to advance the public interest by securing fair opportunity for the play of the contending forces ordinarily engendered by an honest desire for gain."

Mere acquisition by one corporation of the stock of a competitor, even though it result in some lessening of competition, is not forbidden; the act deals only with such acquisitions as probably will result in lessening competition to a substantial degree, *Standard Fashion Co.* v. *Magrane-Houston Co.,* 258 U. S. 346, 357; that is to say, to such a degree as will injuriously affect the public. Obviously, such acquisition will not produce the forbidden result if there be no pre-existing substantial competition to be affected; for the public interest is not concerned in the lessening of competition, which, to begin with, is itself without real substance. To hold that the 95 per cent. of the McElwain product, sold in the large centers of population to meet a distinct demand for that particular product, was sold in competition with the 95 per cent. of the International product, sold in the rural sections and the small towns to meet a wholly different demand, is to apply the word "competition" in a highly deceptive sense. And if it be conceded that the entire remaining five per cent. of each company's product (although clearly it was materially less than that) was sold

in competitive markets, it is hard to see in this, competition of such substance as to fall within the serious purposes of the Clayton Act. Compare *Industrial Ass'n* v. *United States*, 268 U. S. 64, 84.

In addition to the circumstances already cited, the officers of the International testified categorically that there was in fact no substantial competition between the companies in respect of these shoes, but that at most competition was incidental and so imperceptible that it could not be located. The existence of competition is a fact disclosed by observation rather than by the processes of logic; and when these officers, skilled in the business which they have carried on, assert that there was no real competition in respect of the particular product, their testimony is to be weighed like that in respect of other matters of fact. And since there is no testimony to the contrary and no reason appears for doubting the accuracy of observation or credibility of the witnesses, their statements should be accepted.

It follows that the conclusion of the commission and the court below to the effect that the acquisition of the capital stock in question would probably result in a substantial lessening of competition must fail for lack of a necessary basis upon which to rest.

Second. Beginning in 1920 there was a marked falling off in prices and sales of shoes, as there was in other commodities; and, because of excessive commitments which the McElwain Company had made for the purchase of hides as well as the possession of large stocks of shoes and an inability to meet its indebtedness for large sums of borrowed money, the financial condition of the company became such that its officers, after long and careful consideration of the situation, concluded that the company was faced with financial ruin, and that the only alternatives presented were liquidation through a receiver or an outright sale. New orders were not coming in; losses

during 1920 amounted to over $6,000,000; a surplus in May, 1920, of about $4,000,000 not only was exhausted, but within a year had been turned into a deficit of $4,382,136.70. In the spring of 1921 the company owed approximately $15,000,000 to some 60 or 70 banks and trust companies, and, in addition, nearly $2,000,000 on current account. Its factories, which had a capacity of 38,000 to 40,000 pairs of shoes per day, in 1921 were producing only 6,000 or 7,000 pairs. An examination of its balance sheets and statements and the testimony of its officers and others conversant with the situation, clearly shows that the company had reached the point where it could no longer pay its debts as they became due. In the face of these adverse circumstances it became necessary, under the laws of Massachusetts, to make up its annual financial statement, which, when filed, would disclose a condition of insolvency, as that term is defined by the statute and decisions of the State, General Laws 1921, c. 106, § 65 (3); *Holbrook* v. *International Trust Co.*, 220 Mass. 150, 155; *Steele* v. *Commissioner of Banks*, 240 Mass. 394, 397, and thus bring the company to the point of involuntary liquidation. In this situation, dividends on second preferred and common stock were discontinued, and the first preferred stockholders were notified that the company was confronted with the necessity of discontinuing dividends on that class of stock as well.

The condition of the International Company, on the contrary, notwithstanding these adverse conditions in the shoe trade generally, was excellent. That company had so conducted its affairs that its surplus stock was not excessive, and it was able to reduce prices. Instead of a decrease, it had an increase of business of about 25 per cent. in the number of shoes made and sold. During the early months of 1921, orders exceeded the ability of the company to produce, so that approximately one-third of

them were necessarily canceled. In this situation, with demands for its products so much in excess of its ability to fill them, the International was approached by officers of the McElwain Company with a view to a sale of its property. After some negotiation, the purchase was agreed upon. The transaction took the form of a sale of the stock instead of the assets, not, as the evidence clearly establishes, because of any desire or intention to thereby affect competition, but because by that means the personnel and organization of the McElwain factories could be retained, which, for reasons that seem satisfactory, was regarded as vitally important. It is perfectly plain from all the evidence that the controlling purpose of the International in making the purchase in question was to secure additional factories, which it could not itself build with sufficient speed to meet the pressing requirements of its business.

Shortly stated, the evidence establishes the case of a corporation in failing circumstances, the recovery of which to a normal condition was, to say the least, in gravest doubt, selling its capital to the only available purchaser in order to avoid what its officers fairly concluded was a more disastrous fate. It was suggested by the court below, and also here in argument, that instead of an outright sale, any one of several alternatives might have been adopted which would have saved the property and preserved competition; but, as it seems to us, all of these may be dismissed as lying wholly within the realm of speculation. The company might, as suggested, have obtained further financial help from the banks, with a resulting increased load of indebtedness which the company might have carried and finally paid, or, on the other hand, by the addition of which, it might more certainly have been crushed. As to that, one guess is as good as the other. It might have availed itself of a receivership,

but no one is wise enough to predict with any degree of certainty whether such a course would have meant ultimate recovery or final and complete collapse. If it had proceeded, or been proceeded against, under the Bankruptcy Act, holders of the preferred stock might have paid or assumed the debts and gone forward with the business; or they might have considered it more prudent to accept whatever could be salvaged from the wreck and abandon the enterprise as a bad risk.

As between these and all other alternatives, and the alternative of a sale such as was made, the officers, stockholders and creditors, thoroughly familiar with the factors of a critical situation and more able than commission or court to foresee future contingencies, after much consideration, felt compelled to choose the latter alternative. There is no reason to doubt that in so doing they exercised a judgment which was both honest and well informed; and if aid be needed to fortify their conclusion, it may be found in the familiar presumption of rightfulness which attaches to human conduct in general. *Bank of the U. S.* v. *Dandridge*, 12 Wheat. 64, 69. Aside from these considerations, the soundness of the conclusion which they reached finds ample confirmation in the facts already discussed and others disclosed by the record.

In the light of the case thus disclosed of a corporation with resources so depleted and the prospect of rehabilitation so remote that it faced the grave probability of a business failure with resulting loss to its stockholders and injury to the communities where its plants were operated, we hold that the purchase of its capital stock by a competitor (there being no other prospective purchaser), not with a purpose to lessen competition, but to facilitate the accumulated business of the purchaser and with the effect of mitigating seriously injurious consequences otherwise probable, is not in contemplation of law prejudicial to the public and does not substantially

lessen competition or restrain commerce within the intent of the Clayton Act. To regard such a transaction as a violation of law, as this Court suggested in *United States* v. *U. S. Steel Corp.*, 251 U. S. 417, 446–447, would "seem a distempered view of purchase and result." See also *American Press Ass'n* v. *United States*, 245 Fed. 91, 93–94.

For the reasons appearing under each of the two foregoing heads of this opinion, the judgment below must be

Reversed.

MR. JUSTICE STONE, dissenting.

That the facts found by the Commission are a violation of § 7 of the Clayton Act is not questioned. Under § 11, 38 Stat. 730, (U. S. C., Title 15, § 21), the findings of the Commission "if supported by testimony" and the inferences which it may reasonably draw from the facts proved or admitted, are conclusive upon us. See *Federal Trade Commission* v. *Pacific Paper Ass'n*, 273 U. S. 52. Congress has thus forbidden the substitution of the judgment of courts for that of the Commission where it is founded upon evidence. Conforming to this requirement I cannot say that its conclusions here lack the prescribed support. Even without such statutory limitation this Court will not set aside the findings of an administrative board or commission, upheld, as in the present case, by the reviewing court below, unless the record establishes that clear and unmistakable error has been committed. *Cincinnati, &c. Ry. Co.* v. *Interstate Commerce Comm.*, 206 U. S. 142, 154; *Cincinnati, N. O. & T. Ry.* v. *Interstate Commerce Comm.*, 162 U. S. 184, 194; *Illinois Central R. Co.* v. *Interstate Commerce Comm.*, 206 U. S. 441, 466.

The opinion of the Court and the general testimony of petitioner's officers of their conclusions that there was no competition between the two corporations (see *United*

States v. *Trenton Potteries Co.*, 273 U. S. 392) seem to proceed on the assumption that manufacturers, each engaged in marketing a product comparable in price and adapted to the satisfaction of the same need, do not compete if they do not sell to the same distributors.

Without stating it in detail, there appears to me to be abundant evidence that the competitive products, made by two of the largest shoe manufacturers in the world, reached the same local communities through different agencies of distribution; the one, of petitioner, through sales directly to retailers throughout the United States, the other, of the McElwain Company, through sales in thirty-eight states, chiefly to wholesalers located in cities, who in turn sold to the retail trade. From detailed evidence of this type the Commission drew, as I think it reasonably might, the inference that the rival products, through local retailers, made their appeal to the same buying public and so were competitive. From a comparative study of the statistics of sales, the Commission might also, I think, reasonably have found that the McElwain Company was successfully competing, by securing by far the larger proportion of the trade in this type of shoe, its gross sales of dress shoes in 1920 being more than $33,000,000 and in 1921 more than $15,000,000, as compared with petitioner's sales of its similar dress shoes of approximately $2,500,000.

No useful purpose would be served by reviewing the evidence at length. To refer to only two of the many items which support the findings of the Commission, the fact relied upon, that petitioner, in the year ending May 31, 1921, sold only 52-5/12 dozen pairs of the competing shoes to dealers patronizing the McElwain Company, would seem to be without significance in the light of other evidence that in one state, Missouri, where petitioner sold its product to 4,801 of the 5,150 retail shoe dealers in the state, the McElwain Company sold in the same

year, chiefly through wholesalers and independent jobbers, 25,669 dozen pairs of the competing product. It appears that in 1921 petitioner sold its shoes to every retailer in Kentucky, Tennessee and Texas. In that year, when the value of the gross sales of the McElwain Company had been cut in half by business depression, it sold in those states 8,791 dozen pairs of its competing product, chiefly through independent jobbers, in addition to its sales in that territory through wholesale houses at Columbus, Ohio, and Chicago.

Apart from the more general testimony that both companies sold extensively in the same states and in the same cities, the inference from this evidence seems irresistible that in these states, as was the case in others,* the competing products were not only offered through different systems of distribution to the same retailers, but were by them offered and sold to the ultimate consumers in their communities. Both products being made and suitable for the same use, the fact that each presented some minor advantages over the other, it might reasonably be inferred, would tend to increase, rather than diminish the competition. In fact, the chairman of petitioner's board of directors testified that its 500 salesmen were unsuccessful in their efforts to increase the sales of its Patriot Brand of dress shoes (the alleged competitive product) above about 3,000 pairs a day because they were unable to convince retailers of the superiority of petitioner's more serviceable dress shoes over the better

* The petitioner sold to three retail dealers in every four in Illinois. The McElwain Company sold 9547 dozen pairs of competing shoes to independent jobbers and retailers in that state. In addition, an affiliated wholesale house located in Chicago sold about 18,000 dozen pairs. In California, where the International Shoe Company sold to seven retail dealers in every ten, the McElwain Company sold 1586 dozen pairs to retailers and independent jobbers; and an affiliated wholesaler located at San Francisco sold, almost wholly within the state, about 10,000 dozen pairs of the competing shoes.

looking dress shoes of the type manufactured by the McElwain Company.

Nor am I able to say that the McElwain Company, for the stock of which petitioner gave its own stock having a market value of $9,460,000, was then in such financial straits as to preclude the reasonable inference by the Commission that its business, conducted either through a receivership or a reorganized company, would probably continue to compete with that of petitioner. See *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U. S. 346, 356, 357. It plainly had large value as a going concern, there was no evidence that it would have been worth more or as much if dismantled, and there was evidence that the depression in the shoe trade in 1920–1921 was then a passing phase of the business. For these reasons and others stated at length in the opinion of the court below, I think the judgment should be affirmed.

MR. JUSTICE HOLMES and MR. JUSTICE BRANDEIS concur in this opinion.

WILBUR, SECRETARY OF THE INTERIOR, *v.* UNITED STATES EX REL. KRUSHNIC.

CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 63. Argued December 6, 9, 1929.—Decided January 6, 1930.

1. Under the General Mining Law, a perfected location of a mining claim has the effect of a grant by the United States of the right of present and exclusive possession, and so long as the owner complies with that law, this right, for all practical purposes of ownership, is as good as though secured by a patent. P. 316.
2. Failure to perform the annual labor (Rev. Stats. § 2324; U. S. C., Title 30, § 28) renders the claim subject to loss through relocation by another claimant, but it does not *ipso facto* forfeit the claim, and no relocation can be made if work be resumed by the owner after default and before such relocation. P. 317.

3. So far as the Government is concerned, failure to perform labor in any year is without effect, and whenever $500 worth of labor in the aggregate has been performed, and the other requirements, including the payment of the purchase price, have been complied with, the owner is entitled to a patent, even though in some years annual assessment labor has been omitted. P. 317.
4. Under the Mineral Leasing Act of February 25, 1920, which, in respect of lands containing oil shale and other deposits therein specified, substituted a policy of leasing for that of location and acquisition of title, but which, by § 37, saves valid claims existent at the date of the Act and "thereafter *maintained* in compliance with the laws under which instituted," and declares that they may be perfected under such laws, the owner of an oil shale placer claim which was valid at the date of the Act but upon which no labor was performed for the assessment year in which the Act was passed, "maintains" the claim by resuming work thereon in a subsequent year, unless at least some form of challenge on behalf of the United States to the valid existence of the claim has intervened. P. 317.
5. Where the Secretary of the Interior, in declining to issue a patent for a mining claim, interprets and applies a statute in a way contrary to its explicit terms, he departs from a plain official duty, and the error may be corrected by mandamus in the Supreme Court of the District of Columbia. P. 318.
6. The writ of mandamus in this case should direct a disposal of the application for patent on its merits, unaffected by the temporary default in performance of assessment labor for the year 1920; and that further proceedings be in conformity with the views expressed in this opinion as to the proper interpretation and application of the excepting clause in the Leasing Act, and of Rev. Stats. § 2324. P. 319.

30 F. (2d) 742, affirmed with modification.

CERTIORARI, 279 U. S. 831, to review a judgment of the Court of Appeals of the District of Columbia, which reversed a judgment of the Supreme Court of the District dismissing a petition for mandamus.

Mr. George C. Butte, Special Assistant to the Attorney General, with whom *Solicitor General Hughes,* and *Mr. E. C. Finney,* Solicitor, Department of the Interior, were on the brief, for petitioner.

Where, by the terms of an Act, the Secretary is required, upon application of the claimant, to issue a patent or other certificate of title, Congress, by implication, confers upon the Secretary power to make all determinations of law as well as of fact which are essential to the performance of the duty specifically imposed. In making such determinations, " he acts as a special tribunal with judicial functions." *West* v. *Standard Oil Co.*, 278 U. S. 200; *Work* v. *Braffet*, 276 U. S. 560.

The construction of the Act by the Secretary involved the exercise of judgment and discretion, the exercise of judicial functions. In resistance to the writ of mandamus it is believed sufficient to show that the decision of the Secretary was not in apparent defiance of law, nor arbitrary or capricious, but within the scope of the administrative duty confided to him. *Hall* v. *Payne*, 254 U. S. 343; *Riverside Oil Co.* v. *Hitchcock*, 190 U. S. 316; *Ness* v. *Fisher*, 223 U. S. 683; *Alaska Smokeless Coal Co.* v. *Lane*, 250 U. S. 549; *U. S. ex rel. Dunlap* v. *Black*, 128 U. S. 40; *U. S. ex rel. Miller* v. *Raum*, 135 U. S. 200.

The decision was in accord with previous rulings of the Department. *E. C. Kinney*, 44 L. D. 580; *Interstate Oil Corp'n and Frank O. Chittenden*, 50 L. D. 262; *Cronberg* v. *Hazlett*, 51 L. D. 101; Headnote to the Mining Regulations subsequent to the passage of the Leasing Act, 49 L. D. 58. Cf. *Hodgson* v. *Midwest Oil Co.*, 17 F. (2d) 71.

The decision disturbed no vested right of respondent. Respondent's theory as to the nature of the estate after default in the performance of assessment work, if by estate is meant the exclusive right of possession, is not sustained by the opinion in *Belk* v. *Meagher*, 104 U. S. 279, and is incompatible with numerous opinions of this Court and of other eminent authorities on the mining law. Furthermore, this theory would seem to involve the consequence that while the Government could, after the

default, clothe a third party with the right to divest the locator's estate, it could not of itself by legislation directly divest it.

Under the general mining law when the default in the performance of annual labor occurred, the land was open public domain, subject to location and purchase under the mining laws by another; the possessory right of the original locators had come to an end and all that remained to them was the privilege of resuming work before another entered whereby the delinquency would be condoned, and the right of possession restored. The possessory right terminates upon the happening of the default. *Black* v. *Elkhorn Mining Co.,* 163 U. S. 445; *Farrell* v. *Lockhart,* 210 U. S. 142; *Union Oil Co.* v. *Smith,* 249 U. S. 337; *Cole* v. *Ralph,* 252 U. S. 286; *Little Gunnell Co.* v. *Kimber,* 15 Fed. Cas. No. 8402, p. 629; *Swanson* v. *Kettler,* 17 Idaho 321, affirmed *sub nom. Swanson* v. *Sears,* 224 U. S. 180; *Honaker* v. *Martin,* 11 Mont. 91. Cf. § 1, Act of July 2, 1898, c. 563, 30 Stat. 651.

Until the claimant does some act toward paying the purchase money, he obtains no vested right of purchase or claim to a patent. *Benson Mining Co.* v. *Alta Mining Co.,* 145 U. S. 428; *Black* v. *Elkhorn Mining Co.,* 163 U. S. 445.

Congress has power to withdraw the permission to resume work, and its offer to sell the land. *Cameron* v. *United States,* 252 U. S. 450. Cf. *Frisbie* v. *Whitney,* 9 Wall. 187; *Yosemite Valley Case,* 15 Wall. 77; *Shiver* v. *United States,* 159 U. S. 491; *Russian-American Packing Co.* v. *United States,* 199 U. S. 570.

The decision of the Secretary was correct.

We think it plain that the words "thereafter maintained in compliance with the laws under which initiated" refer primarily to the continued performance of assessment work required by such laws for each and every

statutory period. That was the only exaction the mining law had prescribed to maintain a claim. Moreover, the frequency with which " maintained " or equivalent expressions, " kept up," " kept alive," " preserved," are encountered in the decisions of this Court (See *Gwillim* v. *Donnellan,* 115 U. S. 45; *Cole* v. *Ralph,* 252 U. S. 286; *El Paso Brick Co.* v. *McKnight,* 233 U. S. 250; *Union Oil Co.* v. *Smith,* 249 U. S. 337) in referring to the necessity of the annual assessment work, gave it a well-understood meaning.

The theory that the right to resume work under § 2324 is perpetuated by the Leasing Act as to the mineral deposits mentioned in the latter, is opposed to the policy and purpose of the Act. First, it would take away the penalty of forfeiture by relocation imposed in the same section to counterbalance the privilege of resumption. The practical effect of the recognition that such privilege continues, is to render the estate of the locator terminable only at his will and pleasure, no matter how negligent the claimant has been in developing the land. He could hold the claim against any seeker of rights and grantees under the Leasing Act and against the Government itself, except upon establishment that the claim had been abandoned.

Second, if the Leasing Act intended that no new rights could be initiated by relocation, it necessarily follows that it did not intend that any lapsed rights should be reinstated. Section 2324 merely created a race for priority of reëntry for the purpose of development. The only advantage the prior locator had over the relocator was that he could dispense with the initial acts of location. The latter could adopt the previous discovery of the prior locator.

Third, to hold that the right to resume work was preserved by the Leasing Act, would render its proper admin-

istration with respect to lands known to be valuable for oil shale deposits, difficult if not impossible.

An actual entry or office found is not necessary to enable the Government to take advantage of a condition broken, and to resume the possession of lands that have been forfeited. *United States* v. *Repentigny,* 5 Wall. 211; *Schulenberg* v. *Harriman,* 21 Wall. 44; *Farnsworth* v. *Minnesota & P. R. Co.,* 92 U. S. 49; *McMicken* v. *United States,* 97 U. S. 204.

Respondent's contention that some overt act by the Government should take place evincing an intent to repossess the land, or that some judicial proceeding should be initiated before work was resumed, is predicated upon the fallacious premise that the right of resumption of work after default remained after the Leasing Act, and that the Government, therefore, must act the part of a relocator, and get in before the locator gets back.

The entry and improvements made after the default by the respondent in an effort to qualify him to obtain a patent were made in violation of law. He could gain no rights thereby. He, therefore, could set up no equities against the Government by reason thereof. *Deffeback* v. *Hawke,* 115 U. S. 392; *Sparks* v. *Pierce,* 115 U. S. 408.

Messrs. Langdon H. Larwill and *Chester I. Long,* with whom *Messrs. Charles S. Thomas, Malcolm Lindsey, George K. Thomas,* and *Peter Q. Nyce* were on the brief, for respondent.

Mandamus is the proper remedy. *Roberts* v. *United States,* 176 U. S. 221; *Ballinger* v. *Frost,* 216 U. S. 240; *Lane* v. *Hoglund,* 244 U. S. 174; *Work* v. *McAlester-Edwards Co.,* 262 U. S. 200; *Payne* v. *Central Pac. R. Co.,* 255 U. S. 228; *West* v. *Standard Oil Co.,* 278 U. S. 200.

The decision of the Secretary was erroneous. A valid mining claim is property. *Forbes* v. *Gracey,* 94 U. S. 762;

Belk v. *Meagher,* 104 U. S. 279; *Manuel* v. *Wulff,* 152 U. S. 505; *Elder* v. *Horseshoe Co.,* 194 U. S. 248; *Elder* v. *Wood,* 208 U. S. 226; *Bradford* v. *Morrison,* 212 U. S. 389; *Yosemite Nat'l Park,* 25 L. D. 48; *Work* v. *Braffet,* 276 U. S. 560.

It has been repeatedly held that the Government has no concern with the performance of the annual labor under § 2324. *McEvoy* v. *Megginson,* 29 L. D. 164; *Nichols* v. *Priest,* 29 L. D. 401; *In re Wolenberg,* 29 L. D. 302; *Nielson* v. *Champagne Co.,* 29 L. D. 491. Mining Regs., § 55.

Moreover, the performance or nonperformance of annual labor under § 2324 did not affect the right of a locator to a patent under § 2325.

Section 2324 is a penal statute to be construed strictly in favor of the claim-owner. The penalty for failure to perform assessment work within the assessment year has been confined strictly within the language of the statute. The rule has been firmly established that the owner of a mining claim does not lose his estate upon such failure, and that the only penalty resulting from it is the possibility that adverse rights may be initiated, provided always that such initiation take place prior to the resumption of work by the original owner. *Belk* v. *Meagher,* 104 U. S. 279; *North Noonday Mining Co.* v. *Orient Mining Co.,* 1 Fed. 522; *Bingham Copper Co.* v. *Ute Copper Co.,* 181 Fed. 748; *Lacey* v. *Woodward,* 5 N. M. 583; *Emerson* v. *McWhirter,* 133 Cal. 510; *Madison* v. *Octave Oil Co.,* 154 Cal. 768; *Field* v. *Tanner,* 32 Colo. 278; *Knutson* v. *Fredlund,* 56 Wash. 634; *Florence-Rae Copper Co.* v. *Kimbel,* 85 Wash. 162. Distinguishing *Hodgson* v. *Midwest Oil Co.,* 17 F. (2d) 71.

There is nothing in the words of § 37 to show any intent to repeal any portion of the old mining laws under which the claim in question was located. No additional burdens

in the maintenance are placed upon its owner, nor is any privilege or right which he enjoyed under the old laws taken away by the new. If any such deprivation had been attempted, there would be presented a question of the constitutional power of Congress.

The Secretary has attempted to preserve all of the burdens placed upon the owner by § 2324, and, at the same time, to take away the benefit of the right of resumption which is conferred by that section. Such a construction is impossible. Cf. *Thatcher* v. *Brown,* 190 Fed. 708.

The policy or purpose of the Leasing Act cannot affect claims excepted from its operation. They must be scrutinized in the light of the policy and purpose of the old mining laws under which they were initiated. The policy and purpose of the latter were to encourage the development of the mineral resources of the country by extending privileges to the persons who undertook such development. Admittedly, under such prior laws, the Government had no interest in annual labor.

Abandonment and forfeiture distinguished. Lindley on Mines, 3d ed., vol. 2, § 643, pp. 1597, 1598; *Justice Mining Co.* v. *Barclay,* 82 Fed. 554.

The Leasing Act has not removed the necessity of assessment work on the part of the owners of mining claims covering the mineral substances embraced in that Act. If assessment work is in default and the owner fails to resume it, a third person may make application for a lease or may locate the ground for mineral substances not covered by the Leasing Act. Again, the question may be raised by a third person who has initiated rights under laws other than the mining laws.

In the absence of some appropriate judicial action, there must be some appropriate legislative action before a forfeiture may be accomplished for condition broken.

Spokane & B. C. R. Co. v. *Washington & G. N. R. Co.*, 219 U. S. 166; *St. Louis, I. M. & S. R. Co.* v. *McGee*, 115 U. S. 469.

Mr. Justice Sutherland delivered the opinion of the Court.

The disposition of this case depends upon the construction and application of § 2324, R. S. (U. S. C. Title 30, §28), and the effect upon its provisions of § 37 of the Mineral Leasing Act of February 25, 1920, c. 85, 41 Stat. 437, 451 (U. S. C. Title 30, § 193). Section 2324, R. S., which has its origin in § 5 of the Mining Act of 1872 (c. 152, 17 Stat. 91, 92), provides:

"On each claim located after the tenth day of May, eighteen hundred and seventy-two, and until a patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year. . . . and upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location."

By § 2325, R. S. (U. S. C., Title 30, § 29), provision is made for issuing patents for claims located under the mining laws. One of the prerequisites, and the only one in respect of labor, is that the claimant must show "that $500 worth of labor has been expended or improvements made upon the claim by himself or grantors."

The Leasing Act of 1920 effected a complete change of policy in respect of the disposition of lands containing deposits of coal, phosphate, sodium, oil, oil shale, and gas. Such lands were no longer to be open to location and acquisition of title, but only to lease. But § 37 (U. S. C. Title 30, § 193) contains a saving clause protecting "valid claims existent at date of the passage of this Act and

thereafter maintained in compliance with the laws under which initiated," and declaring that they "may be perfected under such laws, including discovery."

On October 1, 1919, respondent and seven associates, all qualified under the law, located a tract of land in Garfield County, Colorado, under the name of Spad No. 3 placer claim. The land contained valuable deposits of oil shale and was open to appropriation under the mining laws of the United States. Spad No. 3 placer claim formed one of a group of six oil placer claims, numbered Spad No. 1, 2, 3, 4, 5 and 6 respectively, all located and owned by the same persons, and lying adjacent to each other. The assessment year 1920, by act of Congress, was extended until July 1, 1921. Prior to that date, annual labor amounting in value, it was asserted, to more than $600 was performed on claims numbered 4, 5 and 6, with the intention that said labor should apply to the entire group.

Subsequently, respondent acquired the interest of his co-locators in the Spad No. 3, and, during and for the assessment year 1921, performed thereon assessment labor of an admitted value of more than $100, and continued to perform labor and make improvements on the claim until the aggregate value exceeded $500. On September 25, 1922, he applied for a patent, and, having complied with the statutory requirements and paid the purchase price, obtained final receiver's receipt on December 16, 1922. No relocation of the claim was ever attempted, nor was the valid existence or maintenance of the claim ever challenged in anywise by the United States, or by anyone, prior to the issue of the receiver's receipt. Thereafter, a proceeding against the entry was instituted by the Commissioner of the General Land Office; and that officer, after consideration, held the claim null and void upon the sole ground of insufficient assessment labor for the year 1920. This holding was affirmed by the Secretary of the Interior.

In all the proceedings before the land officers and the Secretary, it was conceded, as it is here conceded, that the claim was valid and existent when the Leasing Act was passed; and that no reason existed, or now exists, for withholding a patent, save the alleged failure of assessment labor for the assessment year 1920. The Secretary held that by such failure, all rights to the claim became extinguished and could not be saved or revived by a resumption of work.

Thereupon, respondent applied by petition to the Supreme Court of the District of Columbia for a writ of mandamus to compel the Secretary to issue a patent to the claim. After a hearing on rule to show cause, that court discharged the rule and dismissed the petition. Upon appeal this judgment was reversed by the Court of Appeals for the District. 30 F. (2d) 742.

Two questions are presented for determination: (1) Did the Leasing Act of 1920 have the effect of extinguishing the right of the locator, under § 2324, to save his claim under the original location by resuming work after failure to perform annual assessment labor? (2) Is the case a proper one for the writ of mandamus?

1. The rule is established by innumerable decisions of this Court, and of state and lower federal courts, that when the location of a mining claim is perfected under the law, it has the effect of a grant by the United States of the right of present and exclusive possession. The claim is property in the fullest sense of that term; and may be sold, transferred, mortgaged, and inherited without infringing any right or title of the United States. The right of the owner is taxable by the state; and is "real property" subject to the lien of a judgmen recovered against the owner in a state or territorial court. *Belk* v. *Meagher*, 104 U. S. 279, 283; *Manuel* v. *Wulff*, 152 U. S. 505, 510-511; *Elder* v. *Wood*, 208 U. S. 226,

232; *Bradford* v. *Morrison,* 212 U. S. 389. The owner is not required to purchase the claim or secure patent from the United States; but so long as he complies with the provisions of the mining laws, his possessory right, for all practical purposes of ownership, is as good as though secured by patent. While he is required to perform labor of the value of $100 annually, a failure to do so does not *ipso facto* forfeit the claim, but only renders it subject to loss by relocation. And the law is clear that no relocation can be made if work be resumed after default and before such relocation.

Prior to the passage of the Leasing Act, annual performance of labor was not necessary to preserve the possessory right, with all the incidents of ownership above stated, as against the United States, but only as against subsequent relocators. So far as the government was concerned, failure to do assessment work for any year was without effect. Whenever $500 worth of labor in the aggregate had been performed, other requirements aside, the owner became entitled to a patent, even though in some years annual assessment labor had been omitted. *P. Wolenberg et al.,* 29 L. D. 302, 304; *Nielson* v. *Champagne Mining & M. Co.,* 29 L. D. 491, 493.

It being conceded that the Spad No. 3 "was a valid claim existent on February 25, 1920," the only question is whether, within the terms of the excepting clause of § 37, the claim was "thereafter maintained in compliance with the laws under which initiated." These words are plain and explicit, and we have only to expound them according to their obvious and natural sense.

It is not doubted that a claim initiated under § 2324, R. S., could be maintained by the performance of annual assessment work of the value of $100; and we think it is no less clear that after failure to do assessment work, the owner equally maintains his claim, within the meaning

of the Leasing Act, by a resumption of work, unless at least some form of challenge on behalf of the United States to the valid existence of the claim has intervened; for as this court said in *Belk* v. *Meagher, supra,* at page 283, "His rights after resumption were precisely what they would have been if no default [that is, no default in the doing of assessment labor] had occurred." Resumption of work by the owner, unlike a relocation by him, is an act not in derogation but in affirmance of the original location; and thereby the claim is "maintained" no less than it is by performance of the annual assessment labor. Such resumption does not *restore* a *lost* estate—see *Knutson* v. *Fredlund,* 56 Wash. 634, 639; it *preserves* an *existing* estate. We are of opinion that the Secretary's decision to the contrary violates the plain words of the excepting clause of the Leasing Act.

2. While the decisions of this Court exhibit a reluctance to direct a writ of mandamus against an executive officer, they recognize the duty to do so by settled principles of law in some cases. *Lane* v. *Hoglund,* 244 U. S. 174, 181, and cases cited. In *Roberts* v. *United States,* 176 U. S. 221, 231, referred to and quoted in the *Hoglund* case, this Court said:

"Every statute to some extent requires construction by the public officer whose duties may be defined therein. Such officer must read the law, and he must therefore, in a certain sense, construe it, in order to form a judgment from its language what duty he is directed by the statute to perform. But that does not necessarily and in all cases make the duty of the officer anything other than a purely ministerial one. If the law direct him to perform an act in regard to which no discretion is committed to him, and which, upon the facts existing, he is bound to perform, then that act is ministerial, although depending upon a statute which requires, in some degree,

a construction of its language by the officer. Unless this be so, the value of this writ is very greatly impaired. Every executive officer whose duty is plainly devolved upon him by statute might refuse to perform it, and when his refusal is brought before the court he might successfully plead that the performance of the duty involved the construction of a statute by him, and therefore it was not ministerial, and the court would on that account be powerless to give relief. Such a limitation of the powers of the court, we think, would be most unfortunate, as it would relieve from judicial supervision all executive officers in the performance of their duties, whenever they should plead that the duty required of them arose upon the construction of a statute, no matter how plain its language, nor how plainly they violated their duty in refusing to perform the act required."

See also *Ballinger* v. *Frost,* 216 U. S. 240, 250.

In this case, the Secretary interpreted and applied a statute in a way contrary to its explicit terms, and in so doing, departed from a plain official duty. A writ of mandamus should issue directing a disposal of the application for patent on its merits, unaffected by the temporary default in the performance of assessment labor for the assessment year 1920; and that further proceedings be in conformity with the views expressed in this opinion as to the proper interpretation and application of the excepting clause of the Leasing Act of February 25, 1920, and of § 2324, Revised Statutes of the United States. A writ in that form follows the precedent established by this Court in respect of the writ of injunction in *Payne* v. *Central Pac. Ry. Co.,* 255 U. S. 228, 238, and *Payne* v. *New Mexico,* 255 U. S. 367, 373, as being better suited to the occasion than that indicated by the District Court of Appeals. As so modified the judgment of that court is

Affirmed.

JOHNSON *v.* U. S. SHIPPING BOARD EMERGENCY FLEET CORPORATION.[1]

U. S. SHIPPING BOARD EMERGENCY FLEET CORPORATION ET AL. *v.* LUSTGARTEN.

FEDERAL SUGAR REFINING COMPANY *v.* UNITED STATES.

ROYAL INSURANCE COMPANY, LTD., ET AL. *v.* U. S. SHIPPING BOARD MERCHANT FLEET CORPORATION.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Nos. 5, 32, 56, and 123. Argued November 26, 27, 1929.—Decided January 6, 1930.

1. The Suits in Admiralty Act provides the exclusive remedy against the United States or the Fleet Corporation for maritime causes of action arising out of the possession and operation of merchant vessels and precludes suits against the United States under the Tucker Act and actions at law in state or federal courts against the Fleet Corporation or other agents, for the enforcement of such causes of action. P. 325.
2. The following-described proceedings were therefore without jurisdiction:

   (1) An action at law begun in a state court by an individual against the Fleet Corporation to recover for injuries received by the plaintiff when, in returning to the shore from a vessel on which he was seeking employment as a seaman and which was owned by the United States and operated for it by the defendant, he fell from the gangplank and was injured. P. 322.

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[1]Act of February 11, 1927, § 1, c. 104, 44 Stat. 1083, U. S. C. Title 46, § 810a, changed the name of the United States Shipping Board Emergency Fleet Corporation to United States Shipping Board Merchant Fleet Corporation.

(2) An action in the District Court against the Fleet Corporation and an operating agent, by a seaman, to recover damages for injuries sustained by him while serving on a merchant vessel owned by the United States, the complaint alleging (a) negligent failure to provide a safe place in which to work, and (b) wrongful refusal after the injury to provide medical treatment and rest. *Id.*

(3) A suit in the District Court against the United States, under the Tucker Act, for breach of contracts evidenced by bills of lading issued by the master of a vessel owned by the United States and operated through the Shipping Board and an agent—the breach consisting in failure to deliver goods, which were lost or damaged on the voyage. P. 323.

(4) Actions against the Fleet Corporation, begun in a state court, one by underwriters, the other by cargo-owners, to recover for loss and damage of cargo caused by negligence of the defendant, the cargo having been shipped on a merchant vessel owned by the United States and operated by the defendant. P. 324.

24 F. (2d) 963; 28 *id.* 1014; 30 *id.* 254, reversed.

30 F. (2d) 946, affirmed.

THESE cases are separately and succinctly stated in the opinion.

Messrs. Silas B. Axtell and *Myron Scott,* the latter *pro hac vice* by special leave of Court, with whom *Messrs. Charles A. Ellis, Challen B. Ellis,* and *C. Alexander Capron* were on the briefs, for Johnson and Lustgarten.

Mr. Oscar R. Houston, with whom *Mr. F. Herbert Prem* was on the brief, for the Federal Sugar Refining Company.

Mr. John C. Crawley for the Royal Insurance Company et al.

Mr. Claude R. Branch, Special Assistant to the Attorney General, with whom *Solicitor General Hughes, Assistant Attorney General Farnum,* and *Messrs. J. Frank Staley* and *Chauncey G. Parker,* General Counsel, U. S. Shipping Board, were on the briefs, for the United States and the Fleet Corporation.

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MR. JUSTICE BUTLER delivered the opinion of the Court.

No. 5.

August 1, 1920, petitioner was an unemployed seaman. The steamship Jacksonville, then lying in the port of Jacksonville, Florida, was a merchant vessel owned by the United States and operated for it by the Fleet Corporation. On that day, petitioner went aboard to seek employment and, when returning to the shore, fell from the gangplank and suffered serious injuries. This is an action at law brought by him in April, 1923, against the Fleet Corporation in the Supreme Court of New York to recover damages for such injuries. The complaint alleges that, due to the negligence of the defendant's officers and employees, the gangplank was insecure and that plaintiff's injuries were caused thereby. The defendant removed the case to the United States District Court for the Eastern District of New York. Its answer denies the negligence charged in the complaint and alleges that plaintiff was guilty of contributory negligence; that, whatever his rights, plaintiff's remedy is provided exclusively by the Suits in Admiralty Act, approved March 9, 1920, 41 Stat. 525, 46 U. S. C., § 741 *et seq.*, and that his claim is barred because, as appears by the complaint, the action was not commenced within the two years prescribed by that Act. The District Court submitted the case to a jury and charged that, if guilty of contributory negligence, plaintiff could not recover. There was a verdict for defendant and the judgment thereon was affirmed by the Circuit Court of Appeals. 24 F. (2d) 963.

No. 32.

March 6, 1926, the steamship Coelleda was a merchant vessel owned by the United States and operated for it by the Navigation Company as agent pursuant to an

agreement made by the United States acting through the Shipping Board represented by the Fleet Corporation. Merchant Marine Act, 1920, §§ 12, 35, 41 Stat. 993, 1007, 46 U. S. C., §§ 871, 886. Respondent was a seaman employed thereon. This is an action at law brought by him in the United States District Court, Southern District of New York, against the Fleet Corporation and the Navigation Company to recover damages for injuries alleged to have been sustained by him while in that service. The complaint alleges two causes of action: (1) that, due to the negligent failure of defendants to furnish him a safe place in which to work, plaintiff was severely injured; and (2) that, being injured and in need of medical treatment and rest, he was refused such treatment by the master and officers of the ship and was compelled to continue to work. The answer of each defendant denies the negligence and wrongful acts charged in the complaint and alleges that, whatever his rights, plaintiff's remedy is provided exclusively by the Suits in Admiralty Act, and that therefore this action cannot be maintained. The trial court dismissed the first cause of action; and, after denying defendants' motion that a verdict in their favor be directed, submitted the second to a jury. There was a verdict for plaintiff, and the judgment entered thereon was affirmed by the Circuit Court of Appeals.

No. 56.

The United States owned and, through the Shipping Board and West India Steamship Company as agent, operated the merchant vessel Cerosco. In February, 1920, at Sagua La Grande, Cuba, sugar was delivered to the vessel for transportation to New York and delivery there in accordance with bills of lading issued by the master. The vessel arrived in New York in the month following but, because some of the sugar was lost and some was

damaged on the voyage, she failed to make delivery as agreed. January 5, 1924, this action was brought by petitioner in the District Court for the Southern District of New York against the United States under the Tucker Act, Judicial Code, § 24(20), 28 U. S. C., § 41(20), to recover damages—less than ten thousand dollars—for failure to perform the contracts evidenced by the bills of lading. The trial court gave judgment for the defendant. The Circuit Court of Appeals, being of opinion that the limitations prescribed by the Suits in Admiralty Act governed, held that the action was too late and affirmed the judgment. 30 F. (2d) 254.

No. 123.

The steamship Eastern Glade was a merchant vessel owned by the United States and operated by the Fleet Corporation. Merchandise was delivered to the vessel at New York for transportation to various destinations and delivery upon the orders of the consignees. Two actions, one by underwriters and the other by owners, were brought against the Fleet Corporation in the Supreme Court of New York to recover for loss and damage of cargo alleged to have been caused by the negligence of the defendant. The causes of action accrued in December, 1922. The suits were not commenced until September 7, 1928, long after the expiration of the period of limitations fixed by the Suits in Admiralty Act but within the six years allowed by the New York statute. Civil Practice Act, § 48. Defendant removed the suits to the District Court for the Southern District of New York where they were consolidated. The case was tried by the court without a jury upon the complaints and a stipulation which provided that defendant should be deemed by appropriate pleadings to have raised the objection that the Suits in Admiralty Act affords an exclusive remedy for all causes of action for which a libel

in admiralty may be filed thereunder. The court held that the remedy provided by the Act is exclusive and dismissed the case for want of jurisdiction. 30 F. (2d) 946. Plaintiff appealed to the Circuit Court of Appeals for the Second Circuit. We granted this writ before the determination of the case in that court.

In each of these cases there is involved the question whether the Suits in Admiralty Act excludes the remedy invoked by plaintiff.

Section 1, in view of the provision made for libel *in personam,* prevents the arrest or seizure by judicial process of any vessel owned by, in the possession of or operated by or for the United States or any corporation in which the United States or its representatives own the entire outstanding capital stock. Section 2 declares that, in cases where if such vessel were privately owned or operated a proceeding in admiralty could be maintained "at the time of the commencement of the action herein provided for," a libel *in personam* may be brought against the United States or against such corporation, provided that such vessel is employed as a merchant vessel. The pertinent provisions of the Act are printed in the margin of our opinion in *Fleet Corporation* v. *Rosenberg Bros.,* 276 U. S. 202, 209, *et seq.*

Prior to the passage of the Act, merchant vessels of the United States were subject to seizure. § 9, Shipping Act, September 7, 1916, 39 Stat. 730. *The Lake Monroe,* 250 U. S. 246. And the Fleet Corporation was liable to be sued in state or federal courts on causes of action arising out of the operation of such ships. Cf. *Sloan Shipyards* v. *U. S. Fleet Corp.,* 258 U. S. 549. The Act relieved the United States of the inconvenience resulting from such seizures and gave remedy by libel *in personam* against the United States and such corporations. *Blamberg Bros.* v. *United States,* 260 U. S. 452, 458. But

that is not its only purpose. It authorizes libel *in personam* where there is nothing on which recovery *in rem* could be had. *Eastern Transp. Co.* v. *United States,* 272 U. S. 675. And it furnishes the exclusive remedy in admiralty against the United States and such corporations on maritime causes of action arising out of the possession and operation of merchant vessels. In *Fleet Corporation* v. *Rosenberg Bros., supra,* we said (p. 213):

"It provides a remedy in admiralty for adjudicating and satisfying all maritime claims arising out of the possession or operation of merchant vessels of the United States and the corporations, in which the obligation of the United States is substituted for that of the corporations. To that end it furnishes a complete system of administration, applying to the United States and the corporations alike, by which uniformity is established as to venue, service of process, rules of decision and procedure, rate of interest, and periods of limitation; and not only provides that the judgments against the corporations, as well as those against the United States, shall be paid out of money in the Treasury, but repeals the inconsistent provisions of all other Acts. In view of these provisions of the Act we cannot doubt that it was intended to furnish the exclusive remedy in admiralty against the United States and the corporations on all maritime causes of action arising out of the possession or operation of merchant vessels. And nothing in its legislative history indicates a different purpose. It follows that after the passage of the Act no libel in admiralty could be maintained against the United States or the corporations on such causes of action except in accordance with its provisions . . ."

On the facts above stated it is clear that each of the causes of action arose out of the possession or operation of a merchant vessel by or for the United States. Directly or mediately, the money required to pay a judg-

ment against any of the defendants in these cases would come out of the United States. It is the real party affected in all of these actions. § 8, Suits in Admiralty Act; 46 U. S. C., § 748. Cf. *Minnesota* v. *Hitchcock,* 185 U. S. 373, 387.

The analysis of the Act and the reasons on which rests our decision in *Fleet Corporation* v. *Rosenberg Bros.* apply here. Putting the United States and the Fleet Corporation on the same footing and providing remedies to be exclusive in admiralty would not serve substantially to establish uniformity if suits under the Tucker Act and in the Court of Claims be allowed against the United States and actions at law in state and federal courts be permitted against the Fleet Corporation or other agents for enforcement of the maritime causes of action covered by the Act. Such a failure of purpose on the part of the Congress is not readily to be inferred. We conclude that the remedies given by the Act are exclusive in all cases where a libel might be filed under it. As shown above, § 2 authorizes a libel *in personam* against the United States or against the Fleet Corporation in each of these cases. It follows that on disclosure—whether by pleading or proof—of the facts aforesaid, the District Court should have dismissed each case for lack of jurisdiction.

Judgments in Nos. 5, 32 and 56 reversed and causes remanded with directions to dismiss.
Judgment in No. 123 affirmed.

BREWSTER *v.* GAGE, COLLECTOR OF INTERNAL REVENUE.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 61. Argued December 6, 1929.—Decided January 6, 1930.

1. Under the Revenue Acts of 1918 and 1921, which provide, §§ 202 (a), that for the purpose of ascertaining the gain derived or loss sustained from the sale of property "acquired" on or after March

1, 1913, the basis shall be its cost, the latter Act declaring also that in case of "property acquired by bequest, devise, or inheritance, the basis shall be the fair market price or value of such property at the time of such acquisition," the basis of calculation in the case of stocks acquired by the taxpayer as a residuary legatee and sold by him, is not their value at the date of the decree of distribution, but their value at the date of the testator's death. P. 333.

2. The right of a residuary legatee to have his share of the residue after administration, vests immediately upon the testator's death. The decree of distribution confers no new right; it merely identifies the property remaining, evidences the right of possession in the legatee, and requires its delivery by the executor or administrator. The legal title so given relates back to the date of the death. P. 334.
3. The practical interpretation of an ambiguous or doubtful statute that has been acted upon by officials charged with its administration will not be disturbed except for weighty reasons. P. 336.
4. Substantial reënactment in later Acts of a provision theretofore construed in regulations of the department charged with its administration, is persuasive evidence of legislative approval of the regulations. P. 337.
5. In § 113 (a) (5) of the Revenue Act of 1928, which defines the basis of calculating gain or loss in respect of sales of property acquired by devise, bequest or intestacy, the language, deliberately selected, so differs from that used in the earlier Acts as to indicate an intention to change the law. There is no support for the suggestion that it expressed the meaning, or was intended to govern or affect the construction, of the earlier Acts. P. 337.

30 F. (2d) 604, affirmed.

CERTIORARI, 279 U. S. 831, to review a judgment of the Circuit Court of Appeals which reversed a judgment, 25 F. (2d) 915, for Brewster in an action to recover from the Collector amounts exacted as additional income taxes.

Messrs. John W. Davis and *J. Sawyer Fitch,* with whom *Messrs. A. Broomfield* and *Charles Wright, Jr.,* were on the brief, for petitioner.

The only basis specifically mentioned in the 1918 Act for property acquired after March 1, 1913, is cost, and

in a case of this kind there is no cost in the literal sense of the word. The additional provision found in the 1921 Act, namely, § 202 (a) (3), is new and serves to make the statute clearer and more definite by specifying that the basic value of property acquired by bequest is its value when acquired. It can hardly be doubted that, whatever may be the conclusion reached under the 1921 Act, it must rationally be the proper conclusion to be reached under the 1918 Act, and it is not apprehended that the Treasury Department is of a different mind.

The narrow question to be answered is: When were the stocks which Brewster sold in 1920, 1921, and 1922 "acquired" by him within the intendment of the statutes here involved?

The "property" to which § 202 (a) (3) refers is the specific property sold by the residuary legatee. The time of "acquisition" of "such property" was the date of the order of distribution, and is to be distinguished from the acquisition of the mere right to a proper administration of the estate which vested at death. *Wulzen* v. *Board of Supervisors,* 101 Cal. 15; *Ex parte Okahara,* 191 Cal. 353; *White* v. *White,* 47 Vt. 502; *Alexander* v. *Alexander,* 85 Va. 353; *Matthieson* v. *United States,* 65 Ct. Cls. 484; *Appeal of City Bank Co.,* 1 B. T. A. 210; *Appeal of Matthieson,* 2 B. T. A. 921; *Foster* v. *Commissioner,* 7 B. T. A. 1137; *Moser* v. *Commissioner,* 12 B. T. A. 672; *McGee* v. *Commissioner,* 13 B. T. A. 1181.

The long settled common law rule, which has never been changed by any statute or decision affecting this case, is that upon a testator's death, title to personal property not specifically bequeathed, together with the possession, right to collect income therefrom and power to sell, passes to the executor or administrator and not to the residuary legatees, but indeed to the exclusion of such legatees. *United States* v. *Jones,* 236 U. S. 106; *Williams* v. *Cobb,* 242 U. S. 307; *Petersen* v. *Chemical,*

Bank, 32 N. Y. 21; *Matter of Zefita,* 167 N. Y. 280; *Norton* v. *Lilley,* 210 Mass. 214; *State* v. *Circuit Court,* 177 Wis. 548; Schouler on Wills, 6th ed., § 2061; Alexander, Commentaries on Wills, Vol. 3, § 1461.

It may be freely conceded that Brewster acquired something at the date of death, for at that time he acquired a right to an honest administration of the estate and a vested right to participate eventually in the residuum if there should be any. This right is in itself property, and if he should sell it, his gain or loss would be based upon the value of such right at the time he acquired it, the date of death. But this right is not the "property," the stocks, which were distributed to him and which he sold in 1920, 1921, and 1922.

To hold that the property sold was acquired at the date of the testator's death would result in increasing or decreasing a taxpayer's income on account of changes in value of property before it is subject to the disposition and control of such taxpayer. This should not be done in the absence of clearly expressed congressional intent.

The legislative history of the statutes in question fully supports the petitioner's construction.

The broad definition of gross income found in the first income tax statute, the Revenue Act of 1913, has not been changed in any respect here significant in the numerous revenue acts enacted to this date. In each of the Acts there has been excluded from gross income and exempted from the income tax, "the value of property acquired by gift, bequest, devise, or descent." The only change whatsoever occurred in the 1926 Act, when the word "descent" was changed to "inheritance" and this change was retained in the 1928 Act. It is without significance.

In all of the revenue acts, except that of 1913, in which no specific provision is found, the general rule as to basis has been that the basis for determining gain or

loss from the sale of property is the cost of such property if it was acquired after March 1, 1913, and the value of such property at March 1, 1913, if it was acquired prior to that date.

In the 1921 Act, subparagraph (3) of § 202 (a) was added. This was for the purposes both of clarifying and harmonizing the basis provisions with § 213, which excludes "the value of property acquired by . . . bequest . . ." from taxation as income. This provision was retained and reënacted in the 1924 and 1926 Acts. If Congress intended to adopt any such construction as the Department here urges, it would certainly have employed the obvious means of doing so by providing that the basis shall be the value at the date of death. Furthermore, when the section was reënacted in 1926, the Board of Tax Appeals had decided the *Matthieson* case, *supra,* in 1925 holding that the basis is the value at the date of distribution. By the time the 1928 Act was passed, the Board, in the *Foster* case, had reiterated its position, the Court of Claims, in the *Matthieson* case, had followed the Board, and the District Court had decided this case, all contrary to the construction now asked by the Department. And when Congress came to reënact the provisions here under consideration, it spelled out its intention in a fashion that would leave no room whatsoever for doubt. This provision appears as § 113 (a) (5) of the Revenue Act of 1928.

If, as the Department contended below, petitioner's construction results in the escape from tax of income intended to be taxed, then it is impossible to explain why Congress, in the 1928 Act, opened a way of escape, contrary to its consistent policy of closing all ways of escape. The rational explanation is that Congress never intended to tax this enhancement or to allow losses measured by corresponding declines and that the 1928 Act merely provides more definitely that which it had always intended

but as to which doubt had arisen by reason of the conflicting views of the Department on the one hand and the Board of Tax Appeals, the Court of Claims, and the District Court in this case, on the other hand.

Section 113 (a) (5) of the 1928 Act deals with precisely the same subject-matter as § 202 (a) (3) of the 1921 Act, here in controversy, and the identical provisions of the 1924 and 1926 Acts. Where, from a subsequent statute *in pari materia,* it may be ascertained what meaning the law makers attached to the words of a former statute, the subsequent statute will govern the construction of the earlier statute. *United States* v. *Freeman,* 3 How. 556; *Alexander* v. *Alexandria,* 5 Cranch 1; *United States* v. *Coulby,* 251 Fed. 982; affirmed, 258 Fed. 27; *Joy Floral Co.* v. *Commissioner,* 29 F. (2d) 865.

The departmental construction is entitled to no weight in construing the statutes here involved. There has been no long continued or consistent departmental construction; in fact, there was no published departmental regulation or ruling prior to the enactment of the 1926 Act, placing any construction on § 202 (a) (3) of the 1921 Act.

The decision below is not sound; and its construction of the statute leads to inconsistencies and confusion that do not arise under the proper construction.

Solicitor General Hughes, with whom *Assistant Attorney General Youngquist,* and *Messrs. Sewall Key, Randolph C. Shaw, Clarence M. Charest,* and *W. H. Trigg* were on the brief, for respondent.

Mr. Justice Butler delivered the opinion of the Court.

Petitioner's father died testate May 20, 1918. The surrogate's court at Rochester, New York, entered a final decree April 19, 1920, pursuant to which certain stocks

were distributed to the petitioner as one of the residuary legatees. He sold some of them in 1920, 1921 and 1922. For his income tax returns, he computed profit or loss on each sale by comparing the selling price of the stock with its value at the date of the decree of distribution and paid the amounts so determined. But the Commissioner of Internal Revenue held that the values of the stock at the date of testator's death should be taken for the calculation of income, and on that basis assessed for each year an additional tax which petitioner paid under protest. He brought this action in the district court for the western district of New York to recover the amounts so exacted. The court gave judgment for him. 25 F. (2d) 915. The Circuit Court of Appeals reversed. 30 F. (2d) 604.

The taxes for 1920 are governed by the Revenue Act of 1918, 40 Stat. 1057, 1060, 1065, and those for 1921 and 1922 by the Act of 1921, 42 Stat. 227, 229, 237. As defined in these laws, gross income includes gains derived from sales of property but does not include the value of property acquired by bequest, devise or descent. § 213. Section 202(a) in each Act provides that for the purpose of ascertaining the gain derived or loss sustained from the sale of property "acquired" on or after March 1, 1913, the basis shall be its cost. This provision is made more definite in the Act of 1921 by subdivision (3). It provides that, in case of "property, acquired by bequest, devise, or inheritance, the basis shall be the fair market price or value of such property at the time of such acquisition." It is not suggested by either party that this provision changed the law or that the basis for computing the tax for 1920 under the earlier Act is not the same as that applicable for 1921 and 1922 under the later Act. It is necessary to construe the word "acquired" and the phrase "at the time of such acquisition" to determine whether the value of the stock at the time of testator's

death or its value on the date of the decree should be used in the calculation.

Upon the death of the owner, title to his real estate passes to his heirs or devisees. A different rule applies to personal property. Title to it does not vest at once in heirs or legatees. *United States* v. *Jones,* 236 U. S. 106, 112. But immediately upon the death of the owner there vests in each of them the right to his distributive share of so much as shall remain after proper administration and the right to have it delivered upon entry of the decree of distribution. *Sanders* v. *Soutter,* 136 N. Y. 97. *Vail* v. *Vail,* 49 Conn. 52. *Cook* v. *McDowell,* 52 N. J. Eq. 351. Upon acceptance of the trust there vests in the administrators or executors, as of the date of the death, title to all personal property belonging to the estate; it is taken, not for themselves, but in the right of others for the proper administration of the estate and for distribution of the residue. The decree of distribution confers no new right; it merely identifies the property remaining, evidences right of possession in the heirs or legatees and requires the administrators or executors to deliver it to them. The legal title so given relates back to the date of the death. *Foster* v. *Fifield,* 20 Pick. 67, 70. *Wager* v. *Wager,* 89 N. Y. 161, 166. *Thompson* v. *Thomas,* 30 Miss. 152, 158.

Petitioner's right later to have his share of the residue vested immediately upon testator's death. At that time petitioner became enriched by its worth which was directly related to and would increase or decline correspondingly with the value of the property. And, notwithstanding the postponement of transfer of the legal title to him, Congress unquestionably had power and reasonably might fix value at the time title passed from the decedent as the basis for determining gain or loss upon sale of the right or of the property before or after the decree of distribution. And we think that in substance it would not be incon-

sistent with the rules of law governing the descent and distribution of real and personal property of decedents to construe the words in question to mean the date of death.

Undoubtedly the basis for the ascertainment of gain or loss on the sale of real estate by an heir or devisee is its value at the time of decedent's death. That is "the time of such acquisition." The decree of distribution necessarily is later than, and has no definite relation to, the time when the real estate passes. And generally specific bequests are handed over to the legatees soon after the death of the testator and such property may be and often is sold by them prior to the entry of the decree for final distribution. In such cases gains or losses are to be calculated under these Acts on value at the time of death. No other basis is or reasonably could be suggested.

There is nothing in either of the Acts or in their legislative history to indicate a purpose to establish two bases—(1) value of real estate and specific bequests at time of death and (2) value of other property at date of decree. The rule that ambiguities in tax laws are to be resolved in favor of taxpayers has no application here because it is impossible to determine which basis would impose a greater burden. And neither construction is to be preferred on the ground that the other would raise serious question as to constitutional validity. The generality of the words used in both Acts indicates intention that the value at the time of death of the decedent was to be taken as the basis in all cases.

The Revenue Act of 1918 and subsequent Acts taxed incomes of estates during the period of the administration including profits on sales of property, and such gains are calculated on value at date of decedent's death.*

*§ 219, Revenue Act of 1918, 40 Stat. 1071; Regulations 45, Art. 343.
§ 219, Revenue Act of 1921, 42 Stat. 246; Regulations 62, Art. 343.
§ 219, Revenue Act of 1924, 43 Stat. 275; Regulations 65, Art. 343.
§ 219, Revenue Act of 1926, 44 Stat. 32; Regulations 69, Art. 343.

There appears to be no reason why gains or losses to the estate should be calculated on one basis and those to the residuary legatees on another.

Treasury Regulations under the Revenue Acts in force between 1917 and 1928 declared that value at time of the death of decedent should be taken as the basis for ascertaining profit or loss from sale of property acquired by bequest or descent since February 28, 1913. Regulations 33, Revised, paragraph 44, promulgated with reference to § 2(a), Revenue Act of 1916, provided that in computing profit or gain upon property acquired by inheritance, the basis should be appraised value at the time of decedent's death. Regulations 45, Art. 1562, promulgated with reference to § 202 of the Revenue Act of 1918 declared that "for the purpose of determining the profit or loss from the sale of property acquired by bequest, devise or descent since February 28, 1913, its value as appraised for the purpose of the federal estate tax . . . should be deemed to be its fair market value when acquired." And value at the time of death is the basis of that appraisal. § 402. 40 Stat. 1097. Regulations 62, Art. 1563, under the Act of 1921 are substantially to the same effect as the earlier regulations.

These regulations were prepared by the department charged with the duty of enforcing the Acts. The rule so established is reasonable and does no violence to the letter or spirit of the provisions construed. A reversal of that construction would be likely to produce inconvenience and result in inequality. It is the settled rule that the practical interpretation of an ambiguous or doubtful statute that has been acted upon by officials charged with its administration will not be disturbed except for weighty reasons. *Logan* v. *Davis*, 233 U. S. 613, 627. *Maryland Casualty Co.* v. *United States*, 251 U. S. 342, 349. *Swendig* v. *Washington Water Power Co.*, 265 U. S. 322, 331.

The meaning of "acquired" in § 202(a) of the Act of 1918 was not changed by and in context means the same as does the phrase "time of such acquisition" in the corresponding provision of the Act of 1921. And that phrase was continued in § 204(a) (5) of the Revenue Acts of 1924 and 1926. 43 Stat. 258. 44 Stat. 14. The regulations promulgated under that section are substantially the same as the earlier regulations. Regulations 65, Art. 1594. Regulations 69, Art. 1594. The substantial reenactment in later Acts of the provision theretofore construed by the department is persuasive evidence of legislative approval of the regulation. *National Lead Co.* v. *United States*, 252 U. S. 140, 146. *United States* v. *Cerecedo Hermanos y Compañia*, 209 U. S. 337, 339. *United States* v. *G. Falk & Brother*, 204 U. S. 143, 152. The subsequent legislation confirmed and carried forward the policy evidenced by the earlier enactments as interpreted in the regulations promulgated under them.

The Revenue Act of 1928, § 113(a) (5), expressly established value at the time of the death of the decedent as the basis of calculation in respect of sales of personal property acquired by specific bequest and of real estate acquired by general or specific devise or by intestacy, and in all other cases fixed fair market value at the time of distribution to the taxpayer as the basis. 45 Stat. 819. The deliberate selection of language so differing from that used in the earlier Acts indicates that a change of law was intended. Ordinarily, statutes establish rules for the future, and they will not be applied retrospectively unless that purpose plainly appears. *United States* v. *Magnolia Co.*, 276 U. S. 160, 162, and cases cited. There is no support for the suggestion that subdivision (5) expressed the meaning, or was intended to govern or affect the construction, of the earlier statutes.

Judgment affirmed.

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NEW JERSEY BELL TELEPHONE COMPANY *v.* STATE BOARD OF TAXES AND ASSESSMENTS OF THE STATE OF NEW JERSEY.

APPEAL FROM THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY.

No. 254. Argued November 25, 1929.—Decided January 6, 1930.

1. Whatever the terms used by the state legislature to impose a tax or by the state courts in reference to it, the law cannot be sustained if it operates to burden or regulate interstate business. P. 346.
2. A New Jersey telephone company, all of whose line and other property were within that State but part of whose business was in interstate and foreign commerce, was not only taxed *ad valorem* on its real and personal property, but was also subjected to a "franchise tax" of 5% of that part of the gross receipts from all of its business during the year, which bore the same proportion to the whole as the length of its line in the public streets bore to the length of its whole line.

   Held that this exaction was not a charge or rental for use of public property; nor was it a property tax on the company's right to use the streets or on the value of its power of eminent domain and possession of going concern and of a regulated monopoly; that it was neither a tax on property nor in lieu of a property tax, but was a direct tax on gross receipts derived from interstate and foreign commerce and as to that part at least was void under the commerce clause. Pp. 347–349.

105 N. J. L. 641, reversed.

APPEAL from a judgment of the Court of Errors and Appeals of New Jersey which affirmed a judgment of the Supreme Court of the State, 105 N. J. L. 94, sustaining on certiorari a tax assessment against the appellant.

Mr. Thomas G. Haight, with whom *Messrs. Charles M. Bracelen, Frankland Briggs, Alfred E. Holcomb*, and *Leonard A. Sweney* were on the brief, for appellant.

It is well settled that this Court will determine for itself the nature of a tax which it is claimed conflicts with

the Federal Constitution. *Galveston R. Co.* v. *Texas,* 210 U. S. 217; *Crew Levick Co.* v. *Pennsylvania,* 245 U. S. 292; *Quaker City Cab Co.* v. *Pennsylvania,* 277 U. S. 389; *Macallen Co.* v. *Massachusetts,* 279 U. S. 620.

The tax in question is not a substituted or commuted property tax imposed in lieu of other property taxes, but is a license tax, at a fixed rate of 5%, levied directly on appellant's gross receipts derived from interstate as well as intrastate business, and is in addition to the ordinary *ad valorem* taxes on appellant's real and personal property. It is therefore a direct tax on gross receipts derived from interstate commerce, and to that extent, an invalid regulation of or burden upon such commerce. *Philadelphia & S. M. S. S. Co.* v. *Pennsylvania,* 122 U. S. 326; *Galveston R. Co.* v. *Texas,* 210 U. S. 217; *Lyng* v. *Michigan,* 135 U. S. 161; *LeLoup* v. *Mobile,* 127 U. S. 640; *McCall* v. *California,* 136 U. S. 104; *Norfolk & Western R. Co.* v. *Pennsylvania,* 136 U. S. 114; *Williams* v. *Talladega,* 226 U. S. 404; *Hyman* v. *Hayes,* 236 U. S. 178; *Barret* v. *New York,* 232 U. S. 14; *Crew Levick Co.* v. *Pennsylvania,* 245 U. S. 292; *Bowman* v. *Continental Oil Co.,* 256 U. S. 642; *Ozark Pipe Line* v. *Monier,* 266 U. S. 555; *Alpha Cement Co.* v. *Massachusetts,* 268 U. S. 203; *Postal Tel. Co.* v. *Adams,* 155 U. S. 688; *Pullman Co.* v. *Richardson,* 261 U. S. 330; *Sprout* v. *South Bend,* 277 U. S. 163; *Meyer* v. *Wells Fargo & Co.,* 223 U. S. 298. Distinguishing *U. S. Express Co.* v. *Minnesota,* 223 U. S. 335; *Cudahy Co.* v. *Minnesota,* 246 U. S. 450.

Even if the tax can be deemed a property tax, it violates the commerce clause. The State may lay a property tax upon property used in interstate commerce measured by a percentage of gross receipts from the use of the property. But, if the receipts from interstate commerce are included, the tax will be sustained only upon the theory and in the event that the earnings taken may fairly be regarded as an index or measure of the value

of the property taxed, and that the tax imposed is in lieu of and not greater than the ordinary property tax. And if the tax measured by gross receipts is one in addition to the ordinary property tax, it is manifestly void. *Pullman Co.* v. *Richardson,* 261 U. S. 330; *Maine* v. *Grand Trunk R. Co.,* 142 U. S. 217; *U. S. Express Co.* v. *Minnesota,* 223 U. S. 335; *Cudahy Co.* v. *Minnesota,* 246 U. S. 450; *Northwestern Mut. Ins. Co.* v. *Wisconsin,* 247 U. S. 132; *Galveston R. Co.* v. *Texas,* 210 U. S. 217; *Meyer* v. *Wells Fargo Co.,* 223 U. S. 298.

Mr. Duane E. Minard, Assistant Attorney General of New Jersey, with whom *Messrs. Wm. A. Stevens,* Attorney General, and *John Solan* were on the brief, for appellee.

The tax imposes no burden upon interstate commerce in violation of the commerce clause.

By the Act in question, the property of appellant is divided into two classes: (a) real and personal (tangible property); (b) franchises (intangible property).

The real and personal, or tangible property, whether located in the public streets or on private property, is assessed locally in each municipality in the same manner and at the same rates as all private property, and the tax is paid to the municipality.

The real and personal property so assessed consists of physical objects, and the amount of the assessment represents the true or intrinsic value of these naked elements existing within the municipality.

The stipulated record expressly states that no intangible property was assessed locally and that all intangible property is included in the tax in dispute.

Thus the Act substituted for previously existing forms of taxation, two forms, as follows:

1. A tax on tangible property, both real and personal, within the municipalities or taxing districts assessed locally at the local rate for all private property.

2. A tax, measured by 5% of the gross receipts, to cover all franchises or intangible property, such as:

(a) the franchise or privilege of being a corporation;

(b) the special franchise or privilege of occupying streets and public places.

The Act expressly declares this tax to be in lieu of all other franchise taxes, and that all payments to municipalities under previous special franchise agreements for the use of streets shall be credited on the amount of the tax assessed under this Act. It therefore clearly appears that the Legislature expressly intended tha the special franchise to occupy and use the public streets, which is a property right, should be taxed under this Act and that the measure of the tax therein prescribed should include the tax thereon. It is clearly not an occupation tax, since it is not measured by all of the gross receipts of appellant.

This intangible property includes:

1. The right of eminent domain, which is not enjoyed by the corporations which pay only a franchise tax for the privilege of being a corporation.

2. The right to tear up and occupy the public streets by digging trenches to lay and repair conduits, or for the erection and maintenance of poles and wires. These structures become fixtures in and under the streets and occupy a portion of the street to the exclusion of other public use.

3. The benefit of the public policy of the State of New Jersey to have a regulated monopoly of its business within the territory served.

4. The additional value of the naked physical elements, assembled and co-ordinated into a functioning institution ready for and actually engaged in business, known as "going concern value," which, though intangible, is nevertheless substantial.

None of these four rights or benefits belongs to corporations organized under the general corporation act, which pay a license tax solely for the privilege of existing in unity and perpetuity as a corporation. All of them are bestowed by the State upon appellant solely in consideration of the taxes sought to be imposed by this Act.

It is true that the Act calls this a "franchise" tax, but it is obviously not merely a "license" tax. It is more than that. It is a tax on the property value of a special franchise of privilege to enjoy all these benefits which other corporations who pay only a "license" tax for the mere privilege of being corporations do not enjoy. The generic name given to the tax on intangible property is to distinguish it from a tax on tangible property, rather than an attempt to classify it for judicial purposes.

In *Postal Tel. Co.* v. *Adams,* 155 U. S. 688, this Court held that the tax there involved was a property tax, even though the Act expressly called it a privilege tax. This is not a tax upon the gross receipts. It is a tax, in lieu of a direct property tax, upon substantial and valuable property rights which may be sold or assigned for value.

In substance, there is no difference between a tax measured by 5% of the gross receipts, on the intangible property of appellant in the 8,403 miles of its line in the streets and the tax at local rates on the 6,800 miles on private right of way. Both carry interstate messages. If interest on the cost of 8,403 miles of private right of way, in place of the 8,403 miles now in the streets, was included, the mileage in the streets would show a distinct pecuniary advantage over that on private right of way.

The result is that instead of the method of taxation in question being a burden upon interstate commerce (to the extent, if any, that it may be indirectly affected thereby,) it confers a benefit, or bounty, in actual dollars and cents, upon such commerce.

Gross receipts in this case, as in many others which this Court has considered, is the measure and not the subject of the tax.

MR. JUSTICE BUTLER delivered the opinion of the Court.

In 1928 appellee made an assessment against the appellant under a law of New Jersey known as the Voorhees Franchise Tax Act. Appellant caused the assessment by writ of certiorari to be brought to the supreme court of the State and there insisted that as construed the statute is repugnant to the Commerce Clause. That court held the law valid, sustained the tax and dismissed the writ. 105 N. J. L. 94. And its judgment was affirmed in the court of errors and appeals. 105 N. J. L. 641.

As stated in its title, the Act is one "for the taxation of all the property and franchises of persons, copartnerships, associations or corporations [hereinafter referred to as taxpayers] using or occupying public streets, highways, roads or other public places . . ." (hereinafter referred to as streets).[1] Section 1 provides that "all the property, real and personal, and franchises, of" taxpayers who have the right to use or occupy streets shall be valued, assessed and taxed as provided in the Act. Section 2 directs that the respective assessors "shall each year ascertain the value of such property located in, upon or under any public street . . . in each taxing district, and the value of the property not so located; when so ascertained, all such property shall be assessed and taxed at local rates, as now provided by law . . ." And § 3 requires the valuation of all property located in streets to be reported by districts to county boards and by them to appellee.

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[1] P. L. 1900, p. 502, as amended by P. L. 1902, p. 476, P. L. 1917, p. 42, P. L. 1918, p. 907, and P. L. 1927, p. 567.

Section 4 provides that all such taxpayers shall return each year to appellee a statement showing the gross receipts of their business in the State for the calendar year next preceding, and that "the franchise tax of such person, copartnership, association or corporation for business so done in this State" shall be upon such proportion of gross receipts as the length of the line or mains in the streets bears to the length of the whole line or mains. Section 5 prescribes the rate. It was 2 per cent. prior to the amendment of 1917, but that Act increased it to 3 per cent. for 1918, to 4 per cent. for 1919 and to 5 per cent. for 1920 and each year thereafter.

Section 6 requires appellee to apportion the franchise tax among the taxing districts on the basis of the locally assessed value of the taxpayer's property in the streets in each district to the total value of all its property so located. The amounts so apportioned are collected as are other taxes. Section 7 enacts that money paid to a tax district pursuant to contract shall be considered a payment on account of the franchise tax imposed by the Act, and § 8 declares that the franchise tax shall be in lieu of all other franchise taxes assessed against such taxpayers and their property.

Appellant is a corporation organized under the laws of New Jersey and has long carried on a telephone business there. All its lines and property are within that State. October 1, 1927, it succeeded to the property and business in that State of the New York Telephone Company. A supplementary Act approved March 27, 1928, required that company's gross receipts in New Jersey in 1927 to be included for the calculation of the franchise tax assessed against appellant. P. L. 1928, p. 223. Each company furnished intrastate telephone service in New Jersey, and also had large receipts for transmission of messages, passing over its lines in that State and other companies' connecting lines, between places in New Jer-

sey and places in other States and countries. The service so rendered in New Jersey in respect of such interstate and foreign commerce is for brevity called interstate business. Appellant's telephone plant in New Jersey included large amounts of real and personal property which was assessed and taxed locally. The average of the local rates in 1918 was 3.877 per cent.[2] The record does not disclose the assessed value of appellant's property.

The gross receipts of both companies from business in New Jersey in 1927 was $40,280,332.95. Each received from its interstate business in that State between 23 and 24 per cent. of its total. The New York Telephone Company had 10,829 miles of line in New Jersey of which 5,516 were in streets. And the appellant, after the acquisition of the property of the other company, had 15,203 miles, of which 8,403 were in streets. The franchise tax assessed in 1928, calculated as required by the Act, amounted to $1,058,997.85. Appellant paid so much of the tax as was based on its intrastate earnings. The controversy in this case concerns only the 5 per cent. of gross receipts derived from interstate commerce.

The court of errors and appeals rested its decision on the reasons given by the supreme court. The latter declared itself bound to follow a former decision (*Phillipsburg R. Co.* v. *Board of Assessors*, 82 N. J. L. 49) which, construing a like statute taxing street railways, held that the tax was not levied on gross receipts or business but was "merely an excise tax," measured in part by gross earnings, on its franchise to exist as a corporation and its franchise to occupy the streets and that it was not repugnant to the Commerce Clause. Dealing with the tax here involved, the court held it is a tax on property, "earnings being taken merely as a measure of the value of the franchise of the prosecutor."

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[2] Fitzgerald's Legislative Manual, N. J. 1929, p. 293.

Appellant contends that the exaction is a license tax levied directly on gross receipts from interstate as well as intrastate commerce in addition to ad valorem taxes upon its real and personal property and that therefore the Act is repugnant to the Commerce Clause.

Appellee insists that the franchise is intangible property which includes power of eminent domain, right to occupy the streets, going concern value and the benefit of the state policy to have a regulated monopoly. It alludes to Art. IV, § VII, par. 12, of the state constitution: "Property shall be assessed for taxes under general laws and by uniform rules according to its true value"; and argues that, by using gross receipts as a measure of value of the property right, a uniform system of taxation at a true value is attained; that the franchise tax is not upon business, commerce or gross receipts as such.

It is elementary that a State may tax property used to carry on interstate commerce. But, as the Constitution vests exclusively in the Congress power to regulate interstate and foreign commerce, a State may not tax, burden or interfere with such commerce or tax as such gross earnings derived therefrom or impose a license fee or other burden upon the occupation or the privilege of carrying on such commerce, whatever may be the instrumentalities or means employed to that end. *Pullman Co.* v. *Richardson,* 261 U. S. 330, 338, and cases cited. *Sprout* v. *South Bend,* 277 U. S. 163, 171. This tax cannot be sustained if it is not upon the property but is in fact a tax upon appellant's gross receipts from interstate and foreign commerce or a license fee to be computed thereon.

The language of the Act and the decisions of the courts of the State are to be given consideration in determining the actual operation and effect of the tax. But neither is necessarily decisive, for, whatever the terms used by

the legislature to impose the tax or by the courts in reference to it, the law cannot be sustained if it operates to burden or regulate interstate business. *Galveston, H. & S. A. R. Co.* v. *Texas,* 210 U. S. 217, 227. *Quaker City Cab Co.* v. *Pennsylvania,* 277 U. S. 389, 401. *Macallen Co.* v. *Massachusetts,* 279 U. S. 620, 625.

The franchise tax upon gross earnings does not purport to be and is not claimed as a charge or rental for the use of property belonging to the State or any of its subdivisions. Indeed the appellee insists, and rightly so, that the right to construct, maintain and use mains and lines in streets is property owned by appellant; and it argues that the percentage of gross earnings exacted is a tax on that property right. Clearly the State, when passing the Act making the assessment, acted, not as a proprietor demanding compensation for the use of its property, but as sovereign imposing a tax for the support of government. Cf. *St. Louis* v. *Western Union Telegraph Co.,* 148 U. S. 92, 97.

In the title and throughout the Act the distinction is made between the tax on property and the franchise tax on gross receipts. The levying provision (§ 5) defines the exaction as a "franchise tax upon the annual gross receipts" and elsewhere in the Act it is referred to briefly as "franchise tax." All real and personal property is required to be taxed by districts at local rates according to value; the franchise tax is a percentage of gross receipts; and it is declared to be in lieu, not of any property tax, but of all other franchise taxes.

And, as under the state constitution property is required to be assessed by uniform rules according to its true value, the legislature may not reasonably be deemed to have intended direct valuation and assessment of some of the property at local rates and the measurement of the value of other elements of the plant by percentage of gross earnings increasing on a sliding scale from 2 per cent. in 1917 to 5 per cent. in 1920 and thereafter. *North*

Jersey Street R. Co. v. *Jersey City* (Supreme Court) 73 N. J. L. 481; (Court of Errors and Appeals) 74 N. J. L. 761.

While the ground on which the supreme court put its decision in this case does not clearly appear, it is certain that in a number of earlier decisions, the first of which was in 1906, the franchise tax upon gross earnings was held by the courts of the State to be a license fee tax and not a property tax. *North Jersey Street R. Co.* v. *Jersey City, supra. Bergen Aqueduct Co.* v. *State Board,* 95 N. J. L. 486. *Eastern Penna. Power Co.* v. *State Board,* 103 N. J. L. 281. And see *Phillipsburg R. Co.* v. *Board of Assessors, supra.* There is no decision to the contrary unless it is this case. Moreover, the preservation of the distinction between the tax on property and the franchise tax on gross receipts in amendatory Acts passed after the highest court of the State held the latter to be a license fee strongly suggests that the legislature intended the meaning of the Act to be as construed.

And the prescribed basis of apportionment of gross earnings is clearly inconsistent with the taxation according to its true value of appellant's right to use the street for its lines. The telephone property used to render the service from which the earnings are derived includes the lands, buildings, equipment, etc., as well as its lines; and material and labor for operation and maintenance are also required. The assumption underlying the prescribed rule is that, in respect of service and earnings per mile, mains and lines in streets are the same as, or fairly comparable with, the other mains and lines. But it is well known that one stretch of line may consist of only a pair of wires while another stretch may carry many. The property in the streets was directly taxed by districts at $41,189,804.00. Assuming, as appellee contends, that these assessments did not include the value of appellant's right to use streets, it would be without rational basis and

arbitrary to use a mileage proportion of gross earnings to measure the value of the privilege or easement in question. And the amount of the franchise tax upon gross earnings was the equivalent of a tax at the average rate on property of value in excess of $27,000,000. That would assign to the naked right to use streets for telephone mains and lines more than $3200 per mile. There has been called to our attention no precedent for the use of gross earnings as a measure of the value of a single element of such a plant. The elements of value resulting from appellant's power of eminent domain and possession of going concern and of a regulated monopoly cannot reasonably be deemed to be the sole or even a distinct source of the gross earnings by which the tax is measured. We think it very plain that the exaction is not a tax on property nor in substitution for or in lieu of a property tax. Within the rule heretofore applied in this Court the exaction is a direct tax on gross receipts derived from appellant's interstate commerce and, as to that part at least, is void. *Philadelphia Steamship Co.* v. *Pennsylvania,* 122 U. S. 326, 336, 345. *Galveston, H. & S. A. R. Co. v. Texas, supra,* 227. *Meyer* v. *Wells, Fargo & Co.,* 223 U. S. 298. *U. S. Express Co.* v. *Minnesota,* 223 U. S. 335. *Crew Levick Co.* v. *Pennsylvania,* 245 U. S. 292, 295, 297. *Cudahy Packing Co.* v. *Minnesota,* 246 U. S. 450. *U. S. Glue Co.* v. *Oak Creek,* 247 U. S. 321, 329. *Pullman Co.* v. *Richardson, supra.*

Judgment reversed.

MR. JUSTICE STONE took no part in the consideration or decision of this case.

MR. JUSTICE HOLMES, dissenting.

The appellant, a New Jersey corporation, has a part of its lines in and over New Jersey roads and other public places, and transmits over them messages to places both

within the State and outside. For allowing this privilege the State charges a price in the form of a tax of five per cent. on such proportion of the gross receipts from all the work done in the State as the lines in the public places bear to the total lines in the State. There are no lines outside. The lines in public places are more than half the total lines. The interstate business is less than a third of the intrastate. I think the tax constitutional. I call it the price for a privilege, because that is what the Courts of the State pronounce it to be, *North Jersey Street R. Co.* v. *Jersey City,* 73 N. J. L. 481, 484; 74 N. J. L. 761, 763, 765, because on the statutes I think it plainly to be such, and because a statute must be assumed to rest on any and every ground that will support it, except so far as excluded by specific facts.

What then is to hinder New Jersey from charging a reasonable price for something that the appellant cannot have without her consent? It is said that the hindrance lies in the fact that a part of the burden falls on interstate commerce. I am content to assume that if the State were attempting to discriminate against such commerce and using its right as a disguise, the attempt would fail. A right specifically protected by the Constitution may become a wrong when used to carry out an unlawful scheme. But there is nothing of that sort here. The tax is in lieu of all other taxes on intangible property, which the privilege is held to be in New Jersey. The reference to gross earnings to ascertain the value is legitimate. *Cudahy Packing Co.* v. *Minnesota,* 246 U. S. 450. The proportion is prima facie reasonable, especially in view of the proportions between the lengths of the lines and between state and interstate business. It fairly may be supposed that the lines over the streets do their full share of the work. Furthermore, the only objections to the tax raised in the record by the appellants are objections to the tax as a whole in so far as it may touch receipts from interstate

business, not to the proportion adopted. And so I think that the incidence of a part of the tax on interstate commerce, if any such there be, "does not constitute a direct and material burden" upon it. *Hendrick* v. *Maryland*, 235 U. S. 610, 622; *United States Express Co.* v. *Minnesota*, 223 U. S. 335.

I do not think names of any importance in this case, and do not discuss whether the tax is to be called a property tax upon an easement, a franchise tax upon an incorporeal hereditament as it is called in New Jersey, a license tax, or by some other title. If the statute fixes a price for what the appellant needs the State's permission to use, I think it within New Jersey's constitutional power. "Even interstate commerce must pay its way." *Postal Telegraph-Cable Co.* v. *Richmond*, 249 U. S. 252, 259.

MR. JUSTICE BRANDEIS agrees with this opinion.

GRANT, RECEIVER OF THE STRUTHERS FURNACE COMPANY, *v.* A. B. LEACH & COMPANY, INCORPORATED.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 9. Argued April 11, 12, 1929.—Decided January 6, 1930.

1. An allegation in a bill in a federal court, by a receiver, that the suit was brought by authority of the state court which appointed him, is put in issue under the 30th Equity Rule by an allegation in the answer that the defendant has no knowledge or information as to the authority granted the plaintiff in that regard and therefore neither admits nor denies the allegation, but requires the plaintiff to make strict proof thereof. P. 357.
2. The Court of Common Pleas of Ohio appointed a receiver of all the property of a local corporation, in two suits, (1) a suit by a mortgage trustee seeking to satisfy the company's defaulted bonds by foreclosure of the mortgage, and praying for a receiver to take

charge of and manage the company's property and to collect the rents and income therefrom and to sequester all amounts so received from any of the mortgaged property for payment of the bonds, and praying general relief; and (2) a suit by a preferred stockholder of the company against it and the mortgage trustee, alleging that, owing to market conditions and want of capital, the company had ceased operations and was unable to pay or finance its obligations, including the bonds, and would be subject to suits, judgments, executions and sale of its assets, and praying that, for the necessary protection of its bondholders, stockholders and creditors, a receiver be appointed to take charge of and conserve its plant and property until its financial requirements could be provided; and for general relief. The court directed and empowered the receiver to take possession of the property and to do all things necessary to preserve and protect it for the best interests of all parties interested therein, and authorized him to bring suit in the federal court to recover certain of the bonds, or their value, from their holder, upon the ground that they had been obtained from the company under an *ultra vires* and illegal contract in exchange for some of its preferred stock. The claim was a chose in action of the company, and as such was part of the property embraced in the receivership. *Held:*

(1) The Court of Common Pleas had chancery jurisdiction (§ 11894, Gen. Code of Ohio) to appoint the receiver; and even if it was erroneous to extend the receivership under the petition of the mortgage trustee to property not covered by the mortgage, and to grant any receivership under the petition of the stockholder, which prayed no other relief, the validity of the appointment could not be attacked collaterally in another court. P. 358.

(2) The action against the bondholder,—involving, in effect, the claim of an illegal taking of a large amount of the company's bonds, which if recovered would reduce the amount of the mortgage lien,—was within the terms of § 11897, Gen. Code of Ohio, providing that "under the control of the court, the receiver may bring and defend actions in his own name, as receiver, . . . and generally do such acts respecting the property as the court authorizes." P. 360.

(3) In any case, the order specifically authorizing and directing the receiver to bring that action was one which the Court of Common Pleas had jurisdiction to make in the exercise of its discretion and under the construction which it placed upon the statute, and, even if erroneous, was not subject to collateral attack by the party sued under it in the federal court. P. 360.

3. The rule that a chancery receiver, having no title, cannot maintain a suit in a foreign jurisdiction to recover demands or property therein situate, *held* inapplicable to a suit in the District Court by a receiver appointed by a state court having territorial jurisdiction within the Division of the District in which the suit was brought. P. 361.
4. When the Circuit Court of Appeals erroneously reverses a decree of the District Court in favor of a receiver and dismisses the suit, upon the ground that the plaintiff had no authority to sue, this Court, upon correcting the error, will remand the case for determination of the merits. P. 363.

27 F. (2d) 201, reversed.

CERTIORARI, 278 U. S. 593, to review a decision of the Circuit Court of Appeals which reversed a decree of the District Court in favor of Grant, receiver, and dismissed the suit on the ground that he had no authority to sue.

Messrs. James P. Wilson and *A. M. Henderson* for petitioner.

Mr. Edward R. Johnston, with whom *Messrs. Wm. L. Day, Donald W. Kling, Conrad H. Poppenhusen, Floyd E. Thompson,* and *Henry Jackson Darby* were on the brief, for respondent.

MR. JUSTICE SANFORD delivered the opinion of the Court.

Grant, a citizen and resident of Ohio, was appointed by the Common Pleas Court of Mahoning County in that State, receiver of the property and assets of the Struthers Furnace Co., an Ohio corporation. Thereafter, pursuant to an order of that court so directing, he brought this suit in equity against Leach & Co., a New York corporation, in the Federal District Court for the Eastern Division of the Northern District of Ohio,[1] to recover certain mort-

[1] Mahoning County is included in the Eastern Division of the Northern District, and a stated term of the District Court is held therein.

gage bonds of the Furnace Company, or their value. The District Court gave decree in favor of the Receiver. The Circuit Court of Appeals vacated this decree and dismissed the suit, on the ground that it was beyond the power of the Common Pleas Court to authorize the Receiver to bring it. 27 F. (2d) 201.[2]

1. The bonds in question were part of an issue of eight per cent bonds of the Furnace Company, secured by a mortgage upon certain real and personal property. In 1922 Leach & Co. purchased from the Furnace Company a large number of these bonds, at 90½ and accrued interest, for which it paid partly in shares of the seven per cent preferred stock of the Furnace Company, at 85 and accrued dividends, and partly in cash.*

In 1925 the trustee under the mortgage brought suit in the Common Pleas Court against the Furnace Company for foreclosure. The verified petition alleged that the Furnace Company had defaulted in semi-annual interest on the bonds, and all the outstanding bonds had

* This sentence conforms with an amendment made by order of February 24, 1930. Reporter.

[2] The record here consists in part of copies of orders and proceedings in the Common Pleas Court, which were filed in the Circuit Court of Appeals, for its consideration, pursuant to a stipulation of the parties. The Circuit Court of Appeals, after stating that no issue had been made in the evidence in the District Court as to the receiver's authority to bring the action, said: "We preferred not to decide it upon a construction of the pleadings, and hence we suggested to counsel that they file certified copies of any orders or proceedings had in the common pleas court, where the receiver was appointed, and stipulate that this court might consider such orders or proceedings in determining the question on its merits. This suggestion has been acted upon, and certified copies of all pertinent pleadings and orders have been filed." And we have likewise considered the orders and proceedings in the Common Pleas Court, with like effect as if they had been offered in evidence in the District Court.

been declared due and payable. It prayed that judgment be given for the amount of the bonds and interest, that the mortgaged property be sold and the proceeds applied to the payment of the outstanding bonds, that a receiver be appointed to take charge of the "property of the defendant" and manage the same and collect the rents and incomes therefrom, and that he be ordered to set apart and sequester all amounts so received from any of the mortgaged property for the payment of the bonds; and for general relief.

On the same day a preferred stockholder of the Furnace Company, brought suit in the Common Pleas Court against the Furnace Company and the mortgage trustee. The verified petition alleged that the Furnace Company, owing to prevailing market conditions and want of capital, had been compelled to close down its plant and cease operations, had been unable to pay the semi-annual interest on its bonds, was indebted in the sum of $1,500,000 on the bonds, had no funds with which to pay the same and accruing interest, was indebted on past due notes and other current obligations in a sum exceeding $2,000,000 which it could not pay, was unable to finance its obligations, and would be subjected to suits, judgments, and executions and the sale of its property and assets, and that for the protection of bondholders, stockholders and creditors of the Company it was necessary that a receiver be appointed to take charge of and conserve its plant and property until its financial requirements could be provided; and prayed that the court appoint a receiver to take charge of its property and assets, and for general relief.

These causes came on to be heard on the petitions for the appointment of a receiver, whereupon the court consolidated them in so far as the question of the appointment, acts and duties of a receiver were common to both. And, finding that there was urgent exigency for the im-

mediate appointment of a receiver in the two cases to preserve the property and assets of the Furnace Company, the court granted the prayers of the petitions, appointed Grant receiver in both cases, and directed and empowered him to take possession of all the property designated in the trustees' petition, together with all other property, both real and personal, of the Furnace Company, including its books and papers, to do all things necessary in order properly to preserve and protect the assets and property for the best interests of all parties interested therein, and to manage and control the same and collect the rents and income therefrom.

Thereafter Grant applied to the Court for an order granting him as Receiver authority to bring suit in the Federal District Court against Leach & Co., on the ground that it, under an *ultra vires* and illegal contract, had received bonds of the Furnace Company in exchange for preferred stock; and represented to the court that he should recover for the benefit of the stockholders and creditors of the Furnace Company the value of such bonds, or the bonds themselves, and that it would be to the material benefit of the stockholders and creditors if leave to commence such suit were granted. Upon hearing this application, the court, finding that it was for the best interests of the creditors and stockholders of the Furnace Company that such suit be commenced, authorized and directed the Receiver to commence the suit against Leach & Co., praying for such relief as should be obtained against it, in order to reimburse the Receiver for the apparent unlawful and illegal issue of the bonds by the Furnace Company to Leach & Co. in consideration of the preferred stock.

In his petition in the District Court Grant alleged that he was the receiver of all the assets, choses in action and other property of the Furnace Company, duly appointed by the Common Pleas Court, and brought the suit by

virtue of authority so to do granted to him by that court; and that the Furnace Company was without authority to exchange its bonds for its stock. He prayed that the court order Leach & Co. to surrender and deliver to him the bonds that it had received from the Furnace Company in exchange for the stock, or, if it had disposed of the bonds and could not redeliver them, to pay him their value upon the surrender of the stock; and for general relief. Leach & Co., answering the petition on the merits, admitted that the petitioner was duly appointed receiver of all the assets, choses in action and property of the Furnace Company by the Common Pleas Court, but stated that it had no knowledge or information as to the authority granted to him by that court to bring the action, and therefore neither admitted nor denied that allegation but required the plaintiff to make strict proof thereof. This, we think, under the 30th Equity Rule,[3] put in issue the allegation that the action was brought under authority granted by the Common Pleas Court.

At the hearing, the District Court, after stating that the plaintiff was the receiver of the Furnace Company, duly appointed by the Common Pleas Court, and as such possessing all the powers conferred by statute and general principles of equity on a receiver—without referring to the question whether he had been authorized to bring the action [4]—found, upon the evidence, that the transaction

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[3] This Rule provides that: "The defendant in his answer shall in short and simple terms set out his defense to each claim asserted by the bill . . . specifically admitting or denying or explaining the facts upon which the plaintiff relies, unless the defendant is without knowledge, in which case he shall so state, such statement operating as a denial. Averments other than of value or amount of damage, if not denied, shall be deemed confessed, except as against an infant, lunatic, or other person *non compos* and not under guardianship . . ."

[4] No evidence had been offered upon this issue in the District Court; but the absence was fully supplied, by concurrence of both parties, in the Circuit Court of Appeals. See Note 2, *supra*.

by which the bonds were delivered to Leach & Co. violated numerous principles of corporation law, justice and honesty, was a gross fraud upon other preferred stockholders, and could not be sustained against creditors; and, as it appeared that Leach & Co. had disposed of the bonds to innocent purchasers, gave decree against it in favor of the Receiver for their value, with the interest on them that had been paid to Leach & Co.

On appeal by Leach & Co., the Circuit Court of Appeals held, in substance, that the powers of the Receiver were limited to the purposes of the suit in which he was appointed, and the Common Pleas Court could confer upon him authority to do only such acts as were within the scope of its jurisdiction as limited by such purposes; and that since there was no object or purpose in them that could be served by the bringing of the suit against Leach & Co., the court was without authority to direct him to bring it, and the purported authorization so to do was beyond its power. And, without passing upon the merits of the receiver's claim, the decree of the District Court was reversed and the suit dismissed.

2. Upon these facts we conclude that the Circuit Court of Appeals was in error in reversing the decree of the District Court and dismissing the Receiver's action, without consideration of his claim upon the merits. While the argument in this Court has covered a wide range, we do not find it necessary to state more than the controlling reasons which lead us to that conclusion.

The Common Pleas Court by its order had in fact authorized and directed Grant, as receiver, to bring the action in the District Court. The Common Pleas Court had previously appointed him receiver of all the property of the Furnace Company, both real and personal, and had directed and empowered him to take possession thereof and to do all things necessary to preserve and protect it for the best interests of all parties interested therein.

The claim against Leach & Co. arising out of the exchange of bonds for preferred stock, was a chose in action of the Furnace Company, and as such was a part of the property of which he had been appointed receiver.

The Common Pleas Court had jurisdiction of the petitions for the appointment of a receiver in the suits of the mortgage trustee and preferred stockholder; and the power to determine whether, under the allegations of the petitions, it was authorized to appoint a receiver of the Company's property; to what extent and for what purposes; and what authority should be vested in him as such receiver.

Section 11894 of the General Code of Ohio provides that the Common Pleas Court may appoint a receiver in causes pending therein in certain designated cases, and "6. In all other cases in which receivers heretofore have been appointed by the usages of equity."

It is questioned whether under this statute the court rightly appointed, under the petition of the mortgage trustee, a receiver of the portion of the Furnace Company's property which was not covered by the mortgage; and it is asserted that under the petition of the preferred stockholder, in which no other relief was prayed, the appointment was erroneous, under the decisions of the Ohio courts. But, however this may be, the court had jurisdiction and the power to determine these questions. And even if the order appointing the receiver was erroneous and might have been vacated in part in a direct attack, as upon an appeal by the Furnace Company, its validity was not challenged in any respect by the answer of Leach & Co. in the District Court, which admitted the allegation that Grant had been "duly appointed" receiver of all the Company's property. And plainly the validity of the appointment could not have been questioned by a collateral attack in another court. See *Cadle* v. *Baker,* 20 Wall. 650, 651; *Shields* v. *Coleman,* 157 U. S. 168, 178;

Lively v. *Picton* (C. C. A.) 218 Fed. 401, 406; *Lydick* v. *Neville* (C. C. A.) 287 Fed. 479, 482; *Olmstead* v. *Distilling Co.*, (C. C.) 73 Fed. 44, 48; *Shinney* v. *North American Co.* (C. C.) 97 Fed. 9, 10; *Barbour* v. *National Bank*, 45 Oh. St. 133, 140; *McNary* v. *Bush*, 35 Ore. 114, 117.

Section 11897 further provides that "under the control of the court, the receiver may bring and defend actions in his own name, as receiver, . . . and generally do such acts respecting the property as the court authorizes." Under this provision the Common Pleas Court had jurisdiction to determine what actions the receiver might bring. The action against Leach & Co.,—involving in effect the claim of an illegal taking by it of a large amount of the Company's bonds, which if recovered would reduce the amount of the mortgage lien—came, we think, fairly within the terms of the statute as an act respecting property in the custody of the court in the trustee's suit. But even if this were not the case, the order specifically authorizing and directing the receiver to bring the action in the District Court was one which the Common Pleas Court had jurisdiction to make in the exercise of its discretion and under the construction which it placed upon the statute; and, as such, was not one which, even if erroneous, was subject to the collateral attack which Leach & Co. sought to interpose in the District Court. Thus, in *Sanger* v. *Upton, Assignee*, 91 U. S. 56, 58, the District Court, on the application of the assignee of a bankrupt corporation, had made an *ex parte* order that the balance unpaid on the stock of the several stockholders should be paid to the assignee by a certain day, and in default of such payment the assignee should proceed to collect the amount due from each delinquent stockholder. This Court, in a suit instituted by the assignee in the Circuit Court against a stockholder who had failed to pay pursuant to that order, said: "The order was conclusive as to

the right of the assignee to bring the suit. Jurisdiction was given to the District Court by the Bankrupt Act . . . to make it. It was not necessary that the stockholders should be before the court when it was made, any more than that they should have been there when the decree of bankruptcy was pronounced. That decree gave the jurisdiction and authority to make the order. The plaintiff in error could not, in this action, question the validity of the decree; and, for the same reasons, she could not draw into question the validity of the order. She could not be heard to question either, except by a separate and direct proceeding had for that purpose."

3. It is urged, however, in argument that, even if the order of the Common Pleas Court be otherwise valid, Grant is merely a chancery receiver having no title to the property, and therefore cannot maintain an action for its recovery by reason of the settled doctrine in federal jurisprudence that such a receiver has no authority to sue in the courts of a foreign jurisdiction to recover demands or property therein situated, and that his functions and authority are confined to the jurisdiction in which he was appointed. See *Sterrett* v. *Second National Bank,* 248 U. S. 73, 76; and cases cited. The underlying reason for this rule, as shown in *Booth* v. *Clark,* 17 How. 322, 338, and emphasized in *Hale* v. *Allison,* 188 U. S. 56, 68, is that such a receiver "has no extra-territorial power of official action; none which the court appointing him can confer, with authority to enable him to go into a foreign jurisdiction to take possession of the debtor's property; none which can give him, upon the principle of comity, a privilege to sue in a foreign court or another jurisdiction." It has been applied by this Court in cases where a chancery receiver appointed by a state court sought to maintain a suit in a Federal court in another State; its effect there being as appears from a statement in *Hale* v. *Allin-*

son, supra, at p. 68, merely to deny permission to such an action by a receiver, "outside the jurisdiction of the State of his appointment."

Here, however, the Ohio court authorized and directed the Receiver to bring the action in a Federal District Court within Ohio, and having jurisdiction in territory within which the Common Pleas Court itself was located.[5] The Receiver's petition merely prayed for a recovery against Leach & Co., and did not seek an administration of the property by the District Court. Upon such recovery no assets would have to be removed from the territorial jurisdiction of the District Court to Ohio, the State of the receiver's appointment, as they would be recovered and held therein. The order did not authorize or require the receiver to take any extra-territorial action outside of Ohio, either for the purpose of bringing the suit or taking possession of the property recovered; and the bringing of the action within Ohio involved no application to the District Court to be granted the privilege of bringing a suit outside of Ohio upon the principle of comity. We think that under these circumstances the Federal court in the same State cannot rightly be considered a court of foreign jurisdiction within the meaning of the general rule, and that there is no substantial ground for extending that rule, as hitherto applied, so as to bring this case within its terms.

This conclusion is emphasized by the fact that in *Shields* v. *Coleman, supra,* p. 174, a receiver appointed by a chancery court of a Tennessee county, was allowed, without question, pursuant to its order, to maintain an action in the United States Circuit Court for the Eastern District of Tennessee,—within whose territorial limits that county was included—for the restoration of property then in the custody of a receiver appointed by the Fed-

[5] See note 1, *supra.*

eral court. Similar action was taken by this Court in *Harkin* v. *Brundage,* 276 U. S. 36, 42, in a proceeding by receivers appointed by the Superior Court of Cook County, Illinois, brought in the Federal District Court for the Northern District of Illinois. And, conversely, it was held in *Shull* v. *Fidelity & Guaranty Co.,* 81 W. Va. 184, 188, that a receiver appointed by a Federal District Court in West Virginia, might maintain an action in a Circuit Court of the same State, under authority from the Federal court, not being under such circumstances "a foreign receiver" nor proceeding outside of the jurisdiction of his appointment.

4. As the view of the Circuit Court of Appeals that the Receiver was without authority to bring the action against Leach & Co. was erroneous, its judgment must be reversed. And since it did not determine the merits of the Receiver's claim, the case will be remanded to that court with instructions to proceed to that end in conformity with this opinion. See *Buzynski* v. *Luckenbach S. S. Co.,* 277 U. S. 226, 228, and cases cited.

Reversed and remanded.

CARPENTER ET AL. *v.* SHAW, STATE AUDITOR OF OKLAHOMA.

CERTIORARI TO THE SUPREME COURT OF OKLAHOMA.

No. 50. Argued December 5, 1929.—Decided January 6, 1930.

1. Tax exemptions secured to the Indians by agreement between them and the national government are to be liberally construed in favor of the Indians. P. 366.
2. The provision in the "Atoka Agreement" with the Choctaw and Chickasaw Tribes, ratified August 24, 1898, that "all lands allotted shall be non-taxable while the title remains in the original allottees but not to exceed twenty-one years from the date of patent," is to be construed in the sense in which it would be naturally

understood by the Indians, and its meaning at the time of its adoption may not be narrowed by any subsequently declared intention of Congress. P. 367.

3. Section 9814, Comp. Stat. Okla., 1921, imposes a tax upon the owner of any royalty interest in petroleum and natural gas to the extent of 3% of the gross value of the royalty; it makes this tax a lien on such royalty interest and declares that it shall be in lieu of all other taxes "upon any property rights attached to or inherent in the right" to the specified minerals and "upon the mining rights and privileges for the minerals aforesaid belonging to or appertaining to the land." The tax was applied to Indians who had received allotments under the Atoka Agreement and had leased them for the production of oil and gas reserving a royalty of one-eighth of the value of the gross production. *Held* that the tax is not a tax on oil and gas severed from the realty, but is a tax upon the right reserved in the Indians as lessors and owners of the fee, and is forbidden by the tax exemption of the Agreement. P. 367.
4. Where a federal right is concerned, this Court is not bound by the characterization given to a state tax by state courts or legislatures, or relieved by it of the duty of considering the real nature of the tax and its effect upon the federal right asserted. *Id.*
5. A denial by a state court of a recovery of taxes exacted by a state officer in violation of the laws or Constitution of the United States by compulsion is itself in contravention of the Fourteenth Amendment and can not be justified by a state statute limiting suits to recover illegally assessed taxes to taxes paid "at the time and in the manner provided by law." P. 369.

134 Okla. 35, reversed.

CERTIORARI, 279 U. S. 830, to review a judgment of the Supreme Court of Oklahoma, which affirmed a judgment dismissing a suit brought by Indians against the State Auditor to recover money exacted of them as taxes and paid under protest.

Mr. Stephen A. George, with whom *Mr. J. B. Moore* was on the brief, for petitioners.

Messrs. J. Berry King, Attorney General of Oklahoma, and *V. P. Crowe,* Assistant Attorney General, submitted for respondent.

MR. JUSTICE STONE delivered the opinion of the Court.

This case comes here on writ of certiorari, 279 U. S. 830, to the Supreme Court of Oklahoma to review its judgment upholding a tax imposed under § 9814, Compiled Oklahoma Statutes of 1921, upon "the owner of any royalty" in petroleum and natural gas, to the extent of 3% of the gross value of the royalty.

The petitioners are enrolled Choctaw Indians of less than half blood who, by virtue of their membership in the tribe, have received allotments of lands within the State of Oklahoma, under the Atoka Agreement with the Choctaw and Chickasaw Tribes, embodied in § 29 of the Act of June 28, 1898, ratified August 24, 1898, 30 Stat. 495. By this section it is provided that "all the lands allotted shall be non-taxable while the title remains in the original allottees but not to exceed twenty-one years from the date of patent . . .," which period had not expired with respect to the lands of petitioners at any of the times material to the present case. All restrictions on alienation affecting the allotments of these petitioners were removed by Act of Congress of May 27, 1908, 35 Stat. 312.

The petitioners who have leased their allotments for the production of oil and gas, reserving a royalty of one-eighth of the value of the gross production, have paid the tax assessed for 1926 and 1927 under protest, and brought the present suit to recover it as exacted contrary to the exemption. The state court denied recovery on the ground that the tax is imposed only on the oil and gas when severed from the land and so is a tax upon personalty not embraced within the exemption. 134 Okla. 35.

In *Choate* v. *Trapp,* 224 U. S. 665, the history of the Atoka Agreement was reviewed by this Court. It was there held that the provision for the exemption conferred, upon the allottees, property rights which were within

the protection of the Fifth Amendment and hence it was not subject to repeal by later Congressional legislation; that the restriction, being one imposed in the exercise of the plenary power of Congress over the Indian tribes and tribal lands and in the performance of its duty as the guardian of its Indian wards, see *Lone Wolf* v. *Hitchcock,* 187 U. S. 553, 565, and having been accepted by the State of Oklahoma in its constitution upon admission to statehood, was a limitation upon the taxing power of the state. See also *Ward* v. *Love County,* 253 U. S. 17.

Until the removal by the Act of May 27, 1908, of existing restrictions on alienation of the allotted lands, state taxation even more remotely affecting the interests of allottees than the present tax, would concededly have been forbidden as a tax upon an instrumentality of the national government. See *Choctaw & Gulf R. Co.* v. *Harrison,* 235 U. S. 292; *Jaybird Mining Co.* v. *Weir,* 271 U. S. 609; *Gillespie* v. *Oklahoma,* 257 U. S. 501; *Howard* v. *Gipsy Oil Co.,* 247 U. S. 503; *Large Oil Co.* v. *Howard,* 248 U. S. 549. But it is urged that as the restrictions have now been removed, Congress, by its attempted repeal of the exemption and by later legislation of May 10, 1928, 45 Stat. 496, subjecting oil and gas, produced from restricted allotted lands of members of the five civilized tribes, to state and federal taxes, has evidenced an intention to subject the Indians to all taxes imposed upon citizens of Oklahoma. From this it is concluded that the exemption in § 29 must be narrowly construed to effect the Congressional purpose. See *Shaw* v. *Gibson-Zahniser Oil Corp.,* 276 U. S. 575.

While in general tax exemptions are not to be presumed and statutes conferring them are to be strictly construed, *Heiner* v. *Colonial Trust Co.,* 275 U. S. 232, the contrary is the rule to be applied to tax exemptions secured to the Indians by agreement between them and the national government. *Choate* v. *Trapp, supra,* 675.

Such provisions are to be liberally construed. Doubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith. Hence, in the words of Chief Justice Marshall, "The language used in treaties with the Indians should never be construed to their prejudice. If words be made use of, which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense." *Worcester* v. *The State of Georgia,* 6 Pet. 515, 582. See *The Kansas Indians,* 5 Wall. 737, 760. And they must be construed not according to their technical meaning but "in the sense in which they would naturally be understood by the Indians." *Jones* v. *Meehan,* 175 U. S. 1, 11.

Whatever was the meaning of the present exemption clause at the time of its adoption must be taken to be its effect now, since it may not be narrowed by any subsequently declared intention of Congress. *Choate* v. *Trapp, supra.* Having in mind the obvious purpose of the Atoka Agreement to protect the Indians from the burden of taxation with respect to their allotments and this applicable principle of construction, we think the provision that "the lands allotted shall be non-taxable while the title remains in the allottees" cannot be taken to be restricted only to those taxes commonly known as land or real estate taxes, but must be deemed at least to embrace a tax assessed against the allottees with respect to a legal interest in their allotment less than the whole, acquired or retained by them by virtue of their ownership.

Where a federal right is concerned we are not bound by the characterization given to a state tax by state courts or legislatures, or relieved by it from the duty of considering the real nature of the tax and its effect upon

the federal right asserted. *Choctaw Gulf R. Co.* v. *Harrison, supra; Galveston, H. & S. A. R. Co.* v. *Texas,* 210 U. S. 217, 227. We think it plain that the tax imposed on the royalty interest of the present petitioners is not a tax on oil and gas severed from the realty, but is, by its very terms, a tax upon the right reserved in them as lessors and owners of the fee. The tax is imposed on the "royalty interest . . . except such interests of the State of Oklahoma or such royalty interests as are exempted from taxation under the laws of the United States" and is made "a lien on such interest." It is in lieu of all other taxes "upon any property rights attached to or inherent in the right" to the specified minerals and "upon the mining rights and privileges for the minerals aforesaid belonging to or appertaining to the land.

It sufficiently appears, were that controlling, that numerous decisions of the Oklahoma courts since the Atoka agreement have treated the royalty interest of the lessor as a right attached and incident to his ownership or reversionary interest in the land. *Barnes* v. *Keys,* 36 Okla. 6; *Strawn* v. *Brady,* 84 Okla. 66; *Harris* v. *Brady,* 136 Okla. 274; compare *Rich* v. *Doneghey,* 71 Okla. 204, and see *Parker* v. *Riley,* 250 U. S. 66. But even if this did not appear to be the case, an interest commonly so regarded and practically so associated with the use and enjoyment of the allotted lands could not, under the rule of liberal construction rightly invoked by the petitioners, be deemed excluded from the benefits of the exemption granted by § 29. See *Lake Superior Mines* v. *Lord,* 271 U. S. 577, 582; *Waggoner Estate* v. *Wichita County,* 273 U. S. 113; *Butt* v. *Ellett,* 19 Wall. 544; *State* v. *Snyder,* 29 Wyo. 163; *Hearne* v. *Lewis,* 78 Texas 276; *Condit* v. *Neighbor,* 13 N. J. L. 83; *York* v. *Jones,* 2 N. H. 454; *Burden* v. *Thayer,* 3 Metc. (Mass.) 76, 78; *Nelson* v. *Joshel,* 305 Ill. 420, 428; *Frerich* v. *Abrams,* 97 Wash.

460, 462; *Macdonough* v. *Starbird,* 105 Calif. 15, 19. Compare *Pollock* v. *Farmers Loan & Tr. Co.,* 157 U. S. 429.

The Supreme Court of Oklahoma also rested its denial to petitioners of the right to recover the 1926 tax upon the ground that, having failed to pay the tax for the year when due, they were barred by the provisions of §§ 9971 and 9973 of the Compiled Oklahoma Statutes for 1921. Under these sections, relief by injunction against the collection of any tax is forbidden and a suit to recover a tax alleged to be illegally assessed is allowed only if paid "at the time and in the manner provided by law." But the petitioners' allegations, admitted on demurrer, are that the tax was paid under duress and compulsion to prevent the issue of respondent's warrant for its collection, to prevent the stopping by respondent of further royalty payments to them, and to prevent the accumulation of statutory penalties. These allegations are sufficient to bring the case within the ruling of this Court in *Ward* v. *Love County, supra,* that a denial by a state court of a recovery of taxes exacted in violation of the laws or Constitution of the United States by compulsion is itself in contravention of the Fourteenth Amendment. The judgment below will be reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

HENRY FORD & SON, INCORPORATED, *v.* LITTLE FALLS FIBRE COMPANY ET AL.

CERTIORARI TO THE SUPREME COURT OF NEW YORK.

No. 47. Argued December 4, 1929.—Decided January 6, 1930.

A private business corporation, licensed by the Federal Power Commission to use, for development of electric power, the surplus water from a dam in the Hudson River, constructed under acts of Con-

gress, placed flash-boards on the crest of the dam, as the license permitted but did not require it to do, and thus raised the level of the water-pool to such an extent as to diminish the head and impair the value of a dam and water-power belonging to riparian proprietors above on the Mohawk River, a navigable tributary of the Hudson. The parties so injured sued the licensee in the New York courts and were awarded damages and an injunction restraining it from maintaining the flash-boards. *Held:*

1. That the interest of the plaintiffs in the use of the water, even though subject to destruction under the power of the United States to control navigation, was, so far as the state laws were concerned, a vested right acquired under those laws, and as such was, by § 27 of the Federal Water Power Act, expressly saved from destruction or appropriation without compensation by licensees of the Commission; and that the licensee, by acceptance of the license under § 6 of that Act, must be deemed to have agreed to recognize and protect such interests. Pp. 375, 377.

2. Whether § 21 of the Federal Water Power Act, giving to licensees the power of eminent domain, confers on them the power to condemn rights such as those of the plaintiffs, and whether it might have been invoked by the licensee in this case, were questions not before the Court. P. 379.

249 N. Y. 495, affirmed.

CERTIORARI, 279 U. S. 829, to review a judgment entered in the Supreme Court of New York on remittitur from the Court of Appeals, restraining the above-named petitioner from maintaining flash-boards on a dam in the Hudson River, and awarding damages.

Mr. Charles E. Nichols, Jr., with whom *Messrs. Robert E. Whalen, Clifford B. Longley,* and *Wallace R. Middleton* were on the brief, for petitioner.

We are dealing with navigable waters of the United States over which Congress has control for purposes of navigation. In the exercise of this power, Congress has proceeded to erect a dam across the Hudson River, including a lock for the passage of boats, and has dredged and maintained the channel in the pool formed by the dam which extends to respondents' mills.

Congress has also seen fit to enact the Federal Water Power Act, by which a Commission has been created for the purpose of preserving, enlarging and maintaining the navigable capacity of the waters of the United States over which it has jurisdiction. This Commission, acting within the power delegated to it by Congress, has made a finding that navigation would be benefited by issuing a license to petitioner, which included permission to install the flash-boards, whereby the surplus water at this government dam might be utilized for power purposes, requiring from petitioner, in exchange, that it furnish to the Government electric power for the operation, lighting, repair and upkeep of the lock; that it install, maintain, and operate, at its own expense, such lights and signals as the Secretary of War might prescribe; and that it pay to the United States an annual charge or fee of $5,000.00 for the cost of administration of the Federal Water Power Act and for the use of the government dam and property.

The finding of the Federal Power Commission that flash-boards are an aid to navigation is conclusive and binding upon the courts and is not subject to judicial review, except in so far as it may be examined for the purpose of determining whether or not it is arbitrary or capricious, and whether or not the act permitted has a real and substantial relation to the interest of navigation. Where a state court has denied a federal right, this Court has the power to review the record and determine for itself whether there is any basis in fact for the state court's decision,—in this case that the license granted to petitioner does not result in any development and improvement of navigation. The uncontradicted evidence at the trial is that flash-boards do benefit navigation and, consequently, there is a real and substantial relation between the erection of flash-boards and the interests of navigation.

Conceding that the purpose of petitioner was confined to the creation of power, as long as its act was legal, its motive was immaterial; further, the courts may not inquire into the motives of Congress when its activity is confined within the limits of its constitutional authority; and it is, therefore, of no concern to the courts what may have prompted Congress in authorizing the Commission to grant the license to petitioner.

The petitioner has done only what the Federal Government itself could do legally and the courts may not interfere with an act for which Congress has provided, in the exercise of its lawful authority to improve navigable waters. For the courts so to interfere extends beyond their judicial powers and is an attempted usurpation of the legislative function which the Constitution has reposed in Congress alone.

There is nothing in the Federal Water Power Act which creates a cause of action in favor of the respondents; and the Fifth Amendment to the Constitution does not afford a basis for the judgment, because there has been no "taking," but only a consequential damage, and because respondents have not been deprived of "private property," inasmuch as their riparian rights are subject to the paramount right of the Government to make improvements for navigation purposes.

Messrs. George E. O'Connor, Thomas O'Connor, and *Gerald W. O'Connor* were on the brief for respondents.

Respondents' ownership of the water-power, the dam, and the riparian rights is stipulated and conceded.

Under the law of New York the respondents have the right to have the water leave their property at its natural level free from the effect of down-stream obstructions; and the backing of water upon the water-power or lands or buildings of respondents is an invasion of real property rights and constitutes a continuing trespass against which the injured party is entitled to injunctive relief.

These flash-boards were installed by petitioner for its own private purposes and the plea that it was acting as the agent of the Federal Government in the improvement of navigation for the benefit of interstate and foreign commerce is a mere subterfuge.

The license was issued, not for a navigation improvement, but for a water-power project for the development of surplus water-power at a government dam.

The finding of the trial court that no navigation purpose is served by the flash-boards is amply supported by the evidence.

Government permission does not give immunity from liability for invasion of private property rights. It is conclusive only against persons claiming under the public right of navigation. No federal commission has the power to give the petitioner permission to take or damage the private property rights of others without responding in damages.

The correspondence regarding the flash-boards, the regulations and the license constitute a determination by the government officials (1) that the power plant and flash-boards will not interfere with navigation, and (2) of the terms upon which the petitioner shall be permitted to use the water-power owned by the Government at the dam. That is all that the government officials pretended to do in this situation.

Congress did not, by the Federal Water Power Act, assume to invest licensees with the privilege of taking or damaging the property of others with impunity. On the contrary, the Act expressly provides that compensation shall be made for the property of others which may be used or damaged; that the licensee shall be liable for all damages to the property of others, and that no vested rights in waters shall be affected or interfered with.

If the Secretary of War or the Federal Power Commission purported to invest petitioner with " the title, right,

privilege, and immunity . . . to erect and maintain said flash-boards" and thereby take a portion of respondents' water-power and convert it to its own use for private power purposes, their acts are clearly void.

The Federal Government has not the right, without making compensation, to take from the respondents water-power concededly owned by them and transfer the same to the possession and use either of itself or of its licensee, even though the transaction be characterized as a navigation improvement. *United States* v. *Cress*, 243 U. S. 316; *American Woolen Co.* v. *New York*, 195 App. Div. 698.

Mr. Justice Stone delivered the opinion of the Court.

This case comes here on writ of certiorari to review a determination of the Court of Appeals of New York, 249 N. Y. 495, upon which a judgment was entered in the state Supreme Court, awarding damages and an injunction restraining petitioner from maintaining flashboards on the crest of the "Federal Dam," constructed in the Hudson River near Troy, New York, under acts of Congress. Act of June 25, 1910, 36 Stat. 630, c. 382, March 4, 1913, 37 Stat. 801, c. 144.

Respondents, it is stipulated, are riparian owners on the Mohawk River, above its confluence with the Hudson, where at a point about three miles above the Federal Dam they own a dam and water power which they maintain for the development of power for use in their factories on adjacent land. The petitioner, a private business corporation, has procured from the Federal Power Commission a license for a hydro-electric power project, purporting to be granted under the Federal Water Power Act of June 10, 1920, 41 Stat. 1063 (U. S. C., Title 16, c. 12). The license granted permission to use surplus water from the Federal Dam for the development of power at a plant to be constructed and maintained by petitioner for that purpose, on government land. As the license also per-

mits, but does not require, petitioner has placed flashboards on the crest of the dam which, under normal conditions, raise the level of the water in the pool above the dam approximately two feet. Electric power developed by the project is used in the business of an affiliated private manufacturing corporation. The maintenance of the water at the new level has resulted in materially raising the water at the tail-races of respondents' power plants, with a corresponding reduction of the head of water and of the power developed at their dam.

As the court below held, the acts complained of constitute, under local law, an actionable wrong, entitling respondents to an injunction and to damages. *Hammond* v. *Fuller,* 1 Paige (N. Y.) 197; *Brown* v. *Bowen,* 30 N. Y. 519; *Hall* v. *Augsbury,* 46 N. Y. 622, 625, 626; *Rothery* v. *New York Rubber Co.,* 24 Hun. 172, aff'd 90 N. Y. 30; *American Woolen Co.* v. *State,* 195 App. Div. (N. Y.) 698, 705. To avoid this liability petitioner relies on the federal right or immunity specially set up by its answer, that the Hudson and Mohawk are navigable rivers; that all of the acts complained of were done under the license and authority of the Federal Power Commission and under regulations of the Secretary of War, authorized by the Water Power Act; that the license and the acts of petitioner authorized by it were found by the Commission to be desirable and justified in the public interest for the purpose of improving and developing the Hudson River for the benefit of interstate commerce, and that the petitioner, acting under the license, is an agency of the Federal government, in the exercise of its power to regulate commerce and navigation.

It is contended that the navigable capacity of the Hudson and the Mohawk is subject to the regulation and control of Congress, under Clause 3 of § 8, Art. I, of the Constitution, *Gibbons* v. *Ogden,* 9 Wheat. 1; *Gilman* v. *Philadelphia,* 3 Wall. 713, 724; *United States* v. *Chandler-*

Dunbar Co., 229 U. S. 53, 63; *New Jersey* v. *Sargent*, 269 U. S. 328, 337, which may constitutionally be delegated to the Power Commission; cf. *Wisconsin* v. *Illinois*, 278 U. S. 367, 415; that even if the finding of the Commission that the licensed project is in aid of commerce and navigation is not conclusive, as petitioner asserts it is, and even though some of the power developed by petitioner is used for private purposes, the raising of the level of the water by the use of flashboards is shown by the evidence to be beneficial to navigation, and it was therefore within the competency of the Commission to determine whether the project should be authorized. It appears that the petitioner is required by the license and its acceptance of it to supply from the licensed project, power in specified amounts for the lighting and operation of the existing government lock and a second projected lock at the Federal Dam, which are instrumentalities of navigation.

It is argued that Congress, by the Federal Water Power Act, has authorized the Commission to develop navigation and for that purpose to establish obstructions in navigable waters and, subject only to the constitutional requirement of compensation for property taken, its power when so exercised is supreme; that the present exercise of that power does not amount to a taking of the respondents' property for the reason that it does not appear that the obstruction has so raised the water as to flood the respondents' land, and any right of theirs recognized by the state and asserted here, to have the river flow in its natural manner without obstruction, is subordinate to the power of the national government exerted by the Commission through its licensee, whose action so far as it affects respondents' water power, is *damnum absque injuria*. *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53; *Gibson v. United States*, 166 U. S. 269, 271; *Scranton* v. *Wheeler*, 179 U. S. 141, 162, 163; *Lewis Blue Point Oyster Co.* v. *Briggs*, 229 U. S. 82; see *Fox River*

Paper Co. v. *Railroad Commission,* 274 U. S. 651; *Chase-Hibbard Co.* v. *City of Elmira,* 207 N. Y. 460; compare *United States* v. *Cress,* 243 U. S. 316.

The respondents insist, as the court below found, that the Federal Dam was designed to be sufficient for purposes of navigation without the flashboards and it was unnecessary to use them for purposes of navigation; that the petitioner had installed them for the development of power for its own private use; that the effect upon navigation of the power plant and flashboards is negligible, hence the licensed project was not one authorized under the Federal Water Power Act. In any case, it is urged that the injury and damage complained of amount to a taking of respondents' property without compensation and, further, that the Federal Water Power Act, by its terms, does not authorize the granting of licenses which would enable the licensee to destroy or affect the rights of riparian owners.

But, in the view we take of the application of the Federal Water Power Act to the present case, it is unnecessary to decide all the issues thus sharply raised. Whether the Commission acted within or without its jurisdiction in granting the license, and even though the rights which the respondents here assert be deemed subordinate to the power of the national government to control navigation, the present legislation does not purport to authorize a licensee of the Commission to impair such rights recognized by state law without compensation. Even though not immune from such destruction they are, nevertheless, an appropriate subject for legislative protection. See *United States* v. *Realty Co.,* 163 U. S. 427; *Guthrie National Bank* v. *Guthrie,* 173 U. S. 528, 535; *Joslin Co.* v. *Providence,* 262 U. S. 668, 675, 676; *Otis* v. *Ludlow Co.,* 201 U. S. 140, 152; *Oswego & Syracuse R. Co.* v. *State,* 226 N. Y. 351, 356. Especially is there reason for such protection where, as here, their sacrifice may be involved

in the grant of a valuable privilege to a licensee. We think that the provisions of the Act are quite sufficient in themselves to save respondents from any such appropriation of their water power.

Section 10(c) (U. S. C., Title 16, § 803(c)) provides that licensees "shall be liable for all damages occasioned to the property of others by the construction, maintenance or operation" of the licensed project and by § 27 (U. S. C., Title 16, § 821) it is provided, "Nothing contained in this chapter shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective states relating to the control, appropriation or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein." By § 21 (U. S. C., Title 16, § 814), licensees are given the power of eminent domain and authorized to conduct condemnation proceedings in district or state courts for the acquisition "of the right to use or damage the lands or property of others necessary to the construction, maintenance or operation of any dam . . . [or] . . . diversion structure . . ." in connection with an authorized project which they are unable to acquire by contract. By § 6 (U. S. C., Title 16, § 799), all licenses are required to be "conditioned upon acceptance by the licensee of all the terms and conditions of this Act."

While these sections are consistent with the recognition that state laws affecting the distribution or use of water in navigable waters and the rights derived from those laws may be subordinate to the power of the national government to regulate commerce upon them, they nevertheless so restrict the operation of the entire act that the powers conferred by it on the Commission do not extend to the impairment of the operation of those laws or to the extinguishment of rights acquired under them without remuneration. We think the interest here asserted by

the respondents, so far as the laws of the state are concerned, is a vested right acquired under those laws and so is one expressly saved by § 27 from destruction or appropriation by licensees without compensation, and that it is one which petitioner, by acceptance of the license under the provisions of § 6, must be deemed to have agreed to recognize and protect. Whether § 21, giving to licensees the power of eminent domain, confers on them power to condemn rights such as those of respondents, and whether it might have been invoked by the petitioner in the present situation, are questions not before us.

Affirmed.

OHIO EX REL. POPOVICI, VICE-CONSUL OF ROUMANIA, *v.* AGLER ET AL.

CERTIORARI TO THE SUPREME COURT OF OHIO.

No. 35. Argued January 7, 8, 1930.—Decided January 20, 1930.

1. The provisions of Article III, § 2, of the Constitution extending the judicial power to all cases affecting ambassadors, other public ministers and consuls, and investing this Court with original jurisdiction of such cases, do not, of themselves and without more, exclude jurisdiction in the courts of a State over a suit against a vice-consul for divorce and alimony. P. 382.
2. The provisions of the Judicial Code, § 24, par. Eighteenth; § 256, par. Eighth, giving the District Court original jurisdiction, exclusive of the courts of the several States, over all suits against consuls and vice-consuls, should not be construed as granting to the District Court or denying to the state courts, jurisdiction over suits for divorce and alimony. P. 383.

119 Ohio St. 484, affirmed.

CERTIORARI, 279 U. S. 828, to review a judgment of the Supreme Court of Ohio denying a writ of prohibition, which was sought by the petitioner for the purpose of restraining a proceeding for divorce and alimony in the Court of Common Pleas.

Messrs. Atlee Pomerene and *Malcolm Y. Yost,* with whom *Mr. Frank Harrison* was on the brief, for petitioner.

Congress has taken jurisdiction of "all" cases of this kind from the state courts. The Act does not say that it takes from the state courts jurisdiction of all cases except those of divorce and alimony. If it had been so intended, Congress would have said so.

The Supreme Court of Ohio has ignored the plain rule that a statute cannot be amended or extended by judicial construction.

Congress having determined that the jurisdiction of the courts of the United States shall be exclusive of the courts of the several States in all suits and proceedings against vice-consuls, surely this Court will not hold such determination and statute absurd. The reasons which prompted the framers of the Constitution to extend the judicial power of the United States to all cases affecting ambassadors and consuls, and which prompted the Congress to make the jurisdiction of the courts of the United States in such cases exclusive of the courts of the several States, apply to divorce proceedings against diplomatic and consular representatives just as much as to other suits and proceedings against them. The United States has exclusive responsibility for international relations. A vice-consul is a representative of a sovereign of equal dignity with the United States. The foreign sovereign thus represented may have peculiar laws relative to domestic relations. No state court should have the power to draw the United States into complications with a foreign sovereign; and such complications might result from a divorce proceeding just as readily as from any other kind of a suit or proceeding.

This Court long ago decided that consular representatives are exempt from all suits and proceedings in the state courts. *Davis* v. *Packard,* 7 Pet. 276. The decision in that case was under an earlier form of this same statute

which only differs from the present one in that it excepts a few specific criminal matters. It is said in the opinion of this Court in that case: (p. 280) "As an abstract question it is difficult to understand on what ground a state court can claim jurisdiction of civil suits against foreign consuls." (p. 285) "The Act of Congress is general, extending to all suits against consuls." The Court held that the privilege and immunity is not personal to the consul, but is a privilege of the Government which he represents. The Court of Appeals of New York in the *Valario* case held it is also a privilege of the Government of the United States. It is a privilege which he cannot waive.

The question has been decided by the courts of New York and Pennsylvania contrary to the opinion in this cause. *Higginson* v. *Higginson,* 158 N. Y. Supp. 92; *Valario* v. *Thompson,* 7 N. Y. 576; *Mannhardt* v. *Soderstrom,* 4 Binney 138. See also *Sagory* v. *Wissman,* Fed. Cas. No. 12227; *Griffin* v. *Domingues,* 9 N. Y. 656; *Sartori* v. *Hamilton,* 13 N. J. L. 107; 1 Op. Atty. Gen. 406.

If the decision below is correct, a foreign consul can not be sued for divorce and alimony in the state courts of New York and Pennsylvania, but can be sued in the state courts of Ohio,—an intolerable situation in view of the specific legislation of Congress.

This Court has held in the cases cited in the opinion of the court below that federal courts have no jurisdiction of suits or proceedings for divorce and alimony between persons of whom the state courts have jurisdiction; but so far as we have been able to find, it has never held that the federal courts have no jurisdiction of such suits or proceedings against diplomatic and consular representatives of foreign sovereigns.

The court below attached some weight to the fact that the marital contract was with an American woman and consummated in Ohio.

Since the decisions in *Davis* v. *Packard*, 7 Pet. 276, and *Plaquemines Tropical Fruit Co.* v. *Henderson*, 170 U. S. 511, the power of Congress to exclude the courts of the several States from jurisdiction of such cases can not be doubted. The power is unlimited and not qualified by any condition that the federal courts afford a forum.

Mr. Harry Nusbaum, with whom *Mr. Henry W. Harter, Jr.*, was on the brief, for respondents.

Mr. Justice Holmes delivered the opinion of the Court.

The relator was sued for divorce and alimony in a Court of the State of Ohio. He objected to the jurisdiction of the Court, but the objection was overruled and an order for temporary alimony was made. He thereupon applied to the Supreme Court of the State for a writ of prohibition, but upon demurrer to the petition the writ was denied. 119 Ohio State, 484. A writ of certiorari was granted by this Court.

The facts alleged are that the relator is Vice-Consul of Roumania and a citizen of that country, stationed and now residing at Cleveland, Ohio, and it is said by the Supreme Court to have been conceded at the argument that he was married to Helen Popovici, the plaintiff in the original suit, in Stark County, Ohio, where she resided. The relator invokes Article III, Section 2, of the Constitution: "The Judicial Power shall extend . . . to all Cases affecting Ambassadors, other public Ministers and Consuls." "In all Cases affecting Ambassadors, other public Ministers and Consuls . . . the supreme Court shall have original jurisdiction"; and also the Judicial Code, (Act of March 3, 1911, c. 231) § 256, "The jurisdiction vested in the courts of the United States in the cases and proceedings hereinafter mentioned, shall be exclusive of the courts of the several States, . . .

Eighth. Of all suits and proceedings against ambassadors, or other public ministers, or their domestics, or domestic servants, or against consuls or vice-consuls." To this may be added § 24 giving to the District Court original jurisdiction " Eighteenth. Of all suits against consuls and vice-consuls "; the Supreme Court, by § 233, being given " exclusively all such jurisdiction of suits and proceedings against ambassadors or other public ministers, or their domestics or domestic servants, as a court of law can have consistently with the law of nations."

The language so far as it affects the present case is pretty sweeping but like all language it has to be interpreted in the light of the tacit assumptions upon which it is reasonable to suppose that the language was used. It has been understood that, " the whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States," *Ex parte Burrus,* 136 U. S. 586, 593, 594, and the jurisdiction of the Courts of the United States over divorces and alimony always has been denied. *Barber* v. *Barber,* 21 How. 582. *Simms* v. *Simms,* 175 U. S. 162, 167. *De La Rama* v. *De La Rama,* 201 U. S. 303, 307. A suit for divorce between the present parties brought in the District Court of the United States was dismissed. *Popovici* v. *Popovici,* 30 Fed. (2d) 185.

The words quoted from the Constitution do not of themselves and without more exclude the jurisdiction of the State. *Plaquemines Tropical Fruit Co.* v. *Henderson,* 170 U. S. 511. The statutes do not purport to exclude the State Courts from jurisdiction except where they grant it to Courts of the United States. Therefore they do not affect the present case if it be true as has been unquestioned for three-quarters of a century that the Courts of the United States have no jurisdiction over divorce. If when the Constitution was adopted the common understanding

was that the domestic relations of husband and wife and parent and child were matters reserved to the States, there is no difficulty in construing the instrument accordingly and not much in dealing with the statutes. 'Suits against consuls and vice-consuls' must be taken to refer to ordinary civil proceedings and not to include what formerly would have belonged to the ecclesiastical Courts.

It is true that there may be objections of policy to one of our States intermeddling with the domestic relations of an official and subject of a foreign power that conceivably might regard jurisdiction as determined by nationality and not by domicil. But on the other hand if, as seems likely, the wife was an American citizen, probably she remained one notwithstanding her marriage. Act of September 22, 1922, c. 411, § 3; 42 Stat. 1021, 1022. Her position certainly is not less to be considered than her husband's, and at all events these considerations are not for us.

In the absence of any prohibition in the Constitution or laws of the United States it is for the State to decide how far it will go.

Judgment affirmed.

CLARKE, COLLECTOR OF INTERNAL REVENUE, *v.* HABERLE CRYSTAL SPRINGS BREWING COMPANY.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 68. Argued January 9, 1930.—Decided January 27, 1930.

1. Under § 234 (a) (7) of the Revenue Act of 1918, which provides that in computing the net income of corporations there shall be allowed as a deduction "a reasonable allowance for the exhaustion, wear and tear of property used in the trade or business, including a reasonable allowance for obsolescence," a brewing company is not entitled to a deduction for the fiscal year ending May 31, 1919,

on account of "exhaustion" or "obsolescence" of its good will, although it became certain prior to that period that the good will of the company would be destroyed by January 16, 1920, because of prohibition legislation. P. 386.

2. When a business is extinguished as noxious under the Constitution, the Government incurs no liability for compensation to the owners. P. 386.

3. It will not be presumed that Congress intended to provide partial compensation to the owners of a business extinguished as noxious under the Constitution, by an allowance to them, under § 234 (a) (7) of the Revenue Act of 1918, of deductions on account of the "exhaustion" or "obsolescence" of the good will of the business. P. 386.

30 F. (2d) 219, reversed.

CERTIORARI, 279 U. S. 832, to review a judgment of the Circuit Court of Appeals, which reversed a judgment of the District Court, 20 F. (2d) 540, dismissing the complaint, in a suit to recover money exacted and paid as income taxes.

Assistant Attorney General Youngquist, with whom *Solicitor General Hughes, Messrs. Sewall Key* and *Norman D. Keller,* Special Assistants to the Attorney General, *Clarence M. Charest,* General Counsel, Bureau of Internal Revenue, and *T. H. Lewis, Jr.,* were on the brief, for petitioner.

Mr. Arthur A. Ballantine, with whom *Mr. George E. Cleary* was on the brief, for respondent.

MR. JUSTICE HOLMES delivered the opinion of the Court.

A writ of certiorari was granted in this case on May 13, 1929, on account of a conflict between the judgment below, 30 F. (2d) 219, (reversing 20 F. (2d) 540,) and *Red Wing Malting Co.* v. *Willcuts,* 15 F. (2d) 626, (certiorari denied, 273 U. S. 763,) the latter case having been followed by *Landsberger* v. *McLaughlin,* 26 F. (2d) 77, and *Renziehausen* v. *Commissioner of Internal Revenue,* 31 F. (2d) 675, now pending here.

This is a suit brought by the respondent to recover income and profits taxes paid under protest, on the ground, as stated by its counsel, that it was not allowed to deduct from gross income "a reasonable allowance for the exhaustion, including obsolescence, of its good will . . . it having become certain prior to that period that the useful life of the good will would be terminated by January 16, 1920 because of prohibition legislation." The question turns on the Revenue Act of 1918, (Act of February 24, 1919), c. 18, § 234 (a) (7); 40 Stat. 1057, 1078, allowing as deductions, *inter alia*, "A reasonable allowance for the exhaustion, wear and tear of property used in the trade or business, including a reasonable allowance for obsolescence." The good will was that of a brewery and is found to have been destroyed by prohibition legislation. The deduction claimed is for the fiscal year ending May 31, 1919, it having been apparent early in 1918 that prohibition was imminent, and the officers having taken steps to prepare for the total or partial liquidation of the Company. The amount of the deduction to be made is agreed upon if any deduction is to be allowed.

We shall not follow counsel into the succession of regulations or the variations in the law before the date of the Act that we have to construe. In our opinion the words now used cannot be extended to cover the loss in this case and it is needless to speculate as to what other cases it might include. It seems to us plain without help from *Mugler* v. *Kansas*, 123 U. S. 623, that when a business is extinguished as noxious under the Constitution the owners cannot demand compensation from the Government, or a partial compensation in the form of an abatement of taxes otherwise due. It seems to us no less plain that Congress cannot be taken to have intended such a partial compensation to be provided for by the words 'exhaustion' or 'obsolescence.' Neither word is apt to describe

termination by law as an evil of a business otherwise flourishing, and neither becomes more applicable because the death is lingering rather than instantaneous. It is incredible that Congress by an Act approved on February 24, 1919, should have meant to enable parties to cut down their taxes on such grounds because of an amendment to the Constitution that it had submitted to the legislatures of the States in 1917 and that had been ratified by the legislatures of a sufficient number of States the month before the present Act was passed.

Judgment reversed.

MR. JUSTICE MCREYNOLDS and MR. JUSTICE STONE concur in the result.

RENZIEHAUSEN v. LUCAS, COMMISSIONER OF INTERNAL REVENUE.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 114. Argued January 17, 1930.—Decided January 27, 1930.

1. Under § 214 (a)(8) of the Revenue Act of 1918 and § 214 (a) (8) of the Revenue Act of 1921, which provide that in computing net income there shall be allowed as deductions to individuals "a reasonable allowance for the exhaustion, wear and tear of property used in the trade or business, including a reasonable allowance for obsolescence," the owner of a distillery and wholesale liquor business is not entitled to a deduction for the "exhaustion" or "obsolescence" of good will—treated as embracing trade-marks, trade brands and trade names—during the years 1918, 1919, 1920, and 1922, because of federal legislation which proscribed the business. Following *Clarke* v. *Haberle Crystal Springs Brewing Co.*, *ante*, p. 384. P. 389.
2. Whether, under § 214 (a) (4) of the Revenue Act of 1918, which provides that in computing net income there shall be allowed as deductions "losses sustained during the taxable year and not compensated for by insurance or otherwise, if incurred in trade or

business," the owner of a distillery and wholesale liquor business terminated by federal prohibition legislation is entitled to a deduction on account of the loss of good will,—not decided, in absence of evidence sufficient to support the claim. P. 389.

3. Where the owner of a distilling company at the close of each distilling season charged to a special account which he regarded as a personal investment, all whiskey manufactured and not sold, selling it to the trade after two years when it had matured, the whiskey is properly regarded as a part of the stock in trade of the business, and the owner is not entitled to the more favorable rate allowed by the Revenue Act of 1921, § 206 (a) (6), for taxes on capital gain. P. 389.

31 F. (2d) 675, affirmed.

CERTIORARI, *post*, p. 539, to review a judgment of the Circuit Court of Appeals affirming, on appeal, an order of the Board of Tax Appeals.

Mr. William A. Seifert, with whom *Mr. William W. Booth* was on the brief, for petitioner.

Assistant Attorney General Youngquist, with whom *Solicitor General Hughes*, and *Messrs. Sewall Key* and *Norman D. Keller*, Special Assistants to the Attorney General, were on the brief, for respondent.

MR. JUSTICE HOLMES delivered the opinion of the Court.

This case raises the same questions as the preceding one, *Clarke* v. *Haberle Crystal Springs Brewing Co.*, *ante*, p. 384, but was decided the other way. 31 F. (2d) 675. A writ of certiorari was granted by this court on October 14, 1929.

The good will here concerned, (treated as embracing trade-marks, trade brands and trade names,) was that of a business of distilling and selling whiskey, warehousing, and a wholesale liquor business. The Board of Tax Appeals adjudged a deficiency in the petitioner's income tax returns for 1918, 1919, 1920 and 1922. A deduction is

claimed by him, as in the other case, for exhaustion or obsolescence of the good will, under the Revenue Act of 1918, (Act of February 24, 1919,) c. 18, § 214 (a) (8); 40 Stat. 1057, 1067, using the same words for individuals that are used in § 234 for corporations, and under the Revenue Act of 1921, (Act of November 23, 1921,) c. 136, § 214 (a) (8); 42 Stat. 227, 240, using the same words again. What has been said in the *Haberle Crystal Springs Brewing Co.'s* case is sufficient to dispose of this one, and here there is the additional fact that in 1919 the petitioner became aware that he could manufacture whiskey for medicinal purposes and did so until the Willis-Campbell Act of November 23, 1921, c. 134; 42 Stat. 222, was passed and the petitioner failed to obtain a permit under it. The evidence does not seem to warrant an alternative claim under the Revenue Act of 1918, § 214 (a) (4), for losses incurred in business in 1919, even if otherwise it could be sustained.

The only other question that seems to need mention is raised by an account headed "Old Whiskey," on the books of the Large Distilling Company, under which name the petitioner did the distilling business. At the close of each distilling season the whiskey manufactured and not sold was charged to this account, matured and sold to the trade. The petitioner regarded this whiskey as a personal investment, but the whole business was his, and we agree with the Circuit Court of Appeals that the whiskey was clearly a part of the stock in trade, and therefore that he was not entitled to the more favorable rate allowed by the Act of November 23, 1921, c. 136, § 206 (6), for taxes on capital gain, excluding stock in trade. The petitioner has no reason to complain of the allowance for obsolescence of the warehouses.

Decree affirmed.

MR. JUSTICE MCREYNOLDS and MR. JUSTICE STONE concur in the result.

SUPERIOR OIL COMPANY *v.* STATE OF MISSISSIPPI EX REL. KNOX, ATTORNEY GENERAL.

APPEAL FROM THE SUPREME COURT OF MISSISSIPPI.

No. 28. Argued October 31, 1929.—Decided February 24, 1930.

1. In a regular course of business, gasoline was sold by an oil company in Mississippi to shrimp packers in that State, was delivered at the wharves of their packing plants there and was thence carried by the packers' boats to a neighborhood in Louisiana and delivered to shrimp fishermen for use in fishing. The fishermen brought their catches to the packing plants, sold them to the packers and were charged with the cost of the gasoline. The Oil Company received in each case from the packer a so-called bill of lading, signed by the master of the boat on which the gasoline was loaded, purporting to show a consignment to the packer, to the Louisiana neighborhood as destination, on that boat and providing that the gasoline should remain the property of the Oil Company until delivered to the consignee or its agent at such "destination," and that all risks should be upon the purchaser. The Oil Company paid no freight. The packers, when the gasoline was delivered at their plants, were free to do with it as they liked. *Held*, that the sales by the Oil Company were not in interstate commerce and were subject to be taxed by Mississippi. P. 395.
2. It is not within the power of the parties by the form of their contract to convert a local business into an interstate commerce business protected by the Commerce Clause, when the contract achieves nothing else. P. 394.

156 Miss. 377, affirmed.

APPEAL from a judgment of the Supreme Court of Mississippi upholding taxes. The suit was brought by the state Attorney General to collect the taxes from the Oil Company. A judgment of the Chancery Court dismissing the bill was affirmed by the Supreme Court after a hearing before a division thereof consisting of three judges. Upon suggestion of error there was a rehearing by the full court, resulting in the decree here considered.

Messrs. W. Lee Guice and *William H. Watkins,* with whom *Mr. John L. Heiss* was on the brief, for appellant.

The sale and delivery of gasoline in this case, according to the established course of dealing, was in a regular channel of interstate commerce, and formed an integral part thereof.

Interstate commerce comprises not only shipments but negotiations and contracts. *Dahnke-Walker Milling Co.* v. *Bondurant,* 257 U. S. 282; *Lemke* v. *Farmers' Grain Co.,* 258 U. S. 50; *Rosenberger* v. *Pacific Express Co.,* 241 U. S. 48; *Federal Trade Commission* v. *Pacific States P. T. Asso.,* 273 U. S. 52; *Foster-Fountain Packing Co.* v. *Haydel,* 278 U. S. 1.

It is not dependent upon passage of title, nor does it necessarily involve transportation by carrier. *Browning* v. *Waycross,* 233 U. S. 16.

From the moment the interstate movement begins, the commodity is not subject to local taxation.

This case is even stronger in that the tax is one upon the sale itself and not a property tax. The gasoline started on its interstate journey as it was drawn from storage tanks and placed in sealed drums. While it may have been within the range of possibility that the purchaser might divert the shipment, the amount ordered corresponded as to quantity with the requirements of the fishermen in the Louisiana marshes. From the time the gasoline was drawn, there was one continuous movement. To state the case most strongly for Mississippi, the sale was not completed until the drums were placed on the wharf at the water's edge.

The essential facts are that here was a continuous flow of gasoline from Mississippi into Louisiana to be used in the latter State. The question is not of an occasional or an isolated sale. We have a well-established course of

business carried on in a practical manner. Suppose the seller in its own conveyances had contracted to sell and deliver the gasoline at Grant's Pass. That such course of business would have constituted interstate commerce can not be questioned. Suppose there had been a regular carrier either by land or water transporting property to Grant's Pass and the contract of sale had required the seller to deliver the commodity to such carrier. Title would have passed to the buyer upon delivery to the carrier. Yet the transactions would have been in interstate commerce although the title passed in Mississippi. The essential characteristics of interstate commerce are the negotiations, the contract of purchase and the transportation in interstate commerce.

The State can lay no tribute directly or indirectly upon the right to engage in interstate commerce. *Foster-Fountain Packing Co.* v. *Haydel,* 278 U. S. 1, illustrates the immateriality of the means employed in transportation. Substance and not form determines. *Heyman* v. *Hays,* 236 U. S. 178; *Gloucester Ferry Co.* v. *Pennsylvania,* 114 U. S. 196; *South Covington & C. S. R. Co.* v. *Covington,* 235 U. S. 537.

It was competent for the purchaser and the seller to make any agreement they saw fit respecting the passage of the title. *Harkness* v. *Russell,* 118 U. S. 663; *Beardsley* v. *Beardsley,* 138 U. S. 262; Williston on Sales, 2d ed., Vol. 1, par. 259; *Allgeyer* v. *Louisiana,* 165 U. S. 578; *Segrist* v. *Crabtree,* 131 U. S. 287.

If the transactions possess the characteristics and essentials of interstate commerce, they are such, irrespective of what parties may term them. At the same time the form of billing and the terms applied by the parties to the transaction may be looked into in order to determine the real nature of the transaction. *Savage* v. *Jones,* 225 U. S. 501; *Heyman v. Hays,* 236 U. S. 178; *South Covington & C. S. R. Co.* v. *Covington,* 235 U. S. 537;

Western Oil Refining Co. v. *Lipscomb*, 244 U. S. 346; *Atlantic Coast Line R. Co.* v. *Standard Oil Co.*, 275 U. S. 257; *Browning* v. *Waycross*, 233 U. S. 16; *York Manufacturing Co.* v. *Colley*, 247 U. S. 21.

Mr. James W. Cassedy, Jr., Assistant Attorney General of Mississippi, *pro hac vice*, by special leave of Court, with whom *Messrs. George T. Mitchell*, Attorney General of Mississippi, and *E. C. Sharp* were on the brief, for appellee.

Mississippi has the power to levy an excise tax on the sale of gasoline by a distributor to a purchaser, both being residents of the State and the sale being completed in the State, and does not thereby place a burden upon interstate commerce, even though the purchaser move the gasoline to another State. *Pierce Oil Corp.* v. *Hopkins*, 264 U. S. 137.

The State's power to tax property is not destroyed by the fact that it is intended for and will move in interstate commerce. *LaCoste* v. *Department of Conservation*, 263 U. S. 545.

The contracts for sale and delivery must be for sale and delivery across state lines to make the sale exempt from state taxation. A tax without discrimination on sales of gasoline after the interstate transportation ceases, or before it begins, is not a burden on interstate commerce where the sales are entirely contracted for and completed in the taxing State.

Mr. Justice Holmes delivered the opinion of the Court.

This is a suit by the State of Mississippi to collect a tax on distributors of gasoline of three and four cents respectively per gallon sold, according to the statute in force at the time of the sales. The defence was that the sales were in interstate commerce. The Supreme Court of the

State upheld the tax, 119 So. Rep. 360, and the defendant, the Superior Oil Company, appealed to this Court on the ground that the statutes as applied violated the commerce clause of the Constitution of the United States. Article 1, Section 8.

The facts are as follows. The Superior Oil Company, a corporation created and doing business in Mississippi, sold gasoline to packers in Biloxi in that State and delivered it at the packers' wharves. The latter loaded the oil upon their own fishing boats and sent it out to the neighborhood of Grants Pass, Louisiana, where they delivered it to shrimp fishermen for use in fishing. The fishermen brought their catch back to Biloxi, sold it to the packers and were charged with the cost of the oil in account. The appellant received in each case from the purchaser what is called a bill of lading, signed by the master of the boat on which the oil was loaded and reading in part: "Consigned to Gussie Fontaine Pkg. Co. [or other purchasers]. Destination: Grants Pass, La. By boat Frank Louis, owned or operated by Gussie Fontaine Pkg. Co." The instrument then provided that "the property consigned herein remains the property of said Superior Oil Company until it shall be delivered to consignee or consignee's agent at point of destination", with provisions throwing all risks upon the purchasers. The seller of course paid no freight. The document seems to have had no other use than, as the Supreme Court of Mississippi said, to try to convert a domestic transaction into one of interstate commerce. There was no consignee at the point of destination. The goods were delivered to the so-called consignee before they started, and were in its hands throughout. There was no point of destination for delivering of the oil but merely a neighborhood in which the packers that had bought it and already held it expected to sell it again. The document hardly can affect the case, because it is "not within the power of the

parties by the form of their contract to convert what was exclusively a local business, subject to state control, into an interstate commerce business protected by the commerce clause"; *Browning* v. *Waycross,* 233 U. S. 16, 23; at least when the contract achieves nothing else.

The importance of the commerce clause to the Union of course is very great. But it also is important to prevent that clause being used to deprive the States of their lifeblood by a strained interpretation of facts. We may admit that this case is near the line. There was a regular course of business known to the appellant, that took the gasoline into another State, and if by mutual agreement the oil had been put into the hands of a third person, a common carrier, for transportation to Louisiana the mere possibility that the vendor might be able to induce the carrier to forego his rights might not have been enough to keep the transaction out of interstate commerce. *A. G. Spalding & Bros.* v. *Edwards,* 262 U. S. 66, (a case of foreign export, see *Sonneborn Brothers* v. *Cureton,* 262 U. S. 506, 520, 521). But here the gasoline was in the hands of the purchaser to do with as it liked, and there was nothing that in any way committed it to sending the oil to Louisiana except its own wishes. If it had bought bait for fishing that it intended to do itself, the purchase would not have been in interstate commerce because the fishing grounds were known by both parties to be beyond the State line. A distinction has been taken between sales made with a view to a certain result and those made simply with indifferent knowledge that the buyer contemplates that result. *Louisville & Nashville R. R. Co.* v. *Parker,* 242 U. S. 13, 14. *Kalem Co.* v. *Harper Brothers,* 222 U. S. 55, 62. The only purpose of the vendor here was to escape taxation. It was not taxed in Louisiana and hoped not to be in Mississippi. The fact that it desired to evade the law, as it is called, is immaterial, because the very meaning of a line in the law

is that you intentionally may go as close to it as you can if you do not pass it. *Bullen* v. *Wisconsin*, 240 U. S. 625, 630, 631. But on the other hand the desire to make its act an act in commerce among the States was equally unimportant when it was apparent that the buyer's journey to Louisiana was accidental so far as the appellant was concerned. It is a matter of proximity and degree as to which minds will differ, but it seems to us that the connection of the seller with the steps taken by the buyer after the sale was too remote to save the seller from the tax. Dramatic circumstances, such as a great universal stream of grain from the State of purchase to a market elsewhere, may affect the legal conclusion by showing the manifest certainty of the destination and exhibiting grounds of policy that are absent here.

Judgment affirmed.

MR. JUSTICE VAN DEVANTER and MR. JUSTICE BUTLER dissent.

UNITED STATES *v.* WURZBACH.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS.

No. 66. Argued January 20, 1930.—Decided February 24, 1930.

1. A representative in Congress who receives or is concerned in receiving money from officers and employees of the United States for the political purpose of promoting his nomination at a party primary, as a candidate for reëlection, is guilty of the offense defined by § 312 of the Federal Corrupt Practices Act. U. S. C., Title 18, § 208. P. 398.
2. Congress may provide that officers and employees of the United States neither shall exercise nor be subjected to pressure for money for political purposes, upon or by others of their kind, while they retain their office or employment. *Id.*
3. Neither the Constitution nor the nature of the abuse to be checked requires that the words of the Act be confined to political purposes within the control of the United States. P. 399.

4. A representative in Congress, being of a class specifically named in the statute, has no standing to object to it as being too uncertain in defining other classes to which it applies. P. 399.
5. The term "political purpose" is not so vague as to render the statute invalid. *Id.*
6. The objection that the statute leaves uncertain which of several sections imposes the penalty and therefore uncertain what the punishment is, can be raised when a punishment is to be applied and need not be answered upon an appeal from a judgment quashing the indictment. *Id.*

31 F. (2d) 774, reversed.

APPEAL from a judgment of the District Court quashing an indictment.

Mr. Seth W. Richardson, Assistant Attorney General, with whom *Attorney General Mitchell, Solicitor General Hughes* and *Messrs. Oscar R. Luhring,* Assistant Attorney General, *Alfred A. Wheat,* Special Assistant to the Attorney General, and *Harry S. Ridgely* were on the briefs, for the United States.

Mr. Hugh R. Robertson for the appellee.

MR. JUSTICE HOLMES delivered the opinion of the Court.

The respondent was indicted under the Federal Corrupt Practices Act, 1925; Act of February 28, 1925, c. 368, § 312, 43 Stat. 1053, 1073; U. S. Code, Title 18, § 208; on charges that being a representative in Congress he received and was concerned in receiving specified sums of money from named officers and employees of the United States for the political purpose of promoting his nomination as Republican candidate for representative at certain Republican primaries. Upon motion of the defendant the District Court quashed the indictment on the ground that the statute should not be construed to include the political purpose alleged, and, construed to in-

clude it, probably would be unconstitutional. The United States appealed.

The section of the statute is as follows:

"It is unlawful for any Senator or Representative in, or Delegate or Resident Commissioner to, Congress, or any candidate for, or individual elected as, Senator, Representative, Delegate, or Resident Commissioner, or any officer or employee of the United States, or any person receiving any salary or compensation for services from money derived from the Treasury of the United States, to directly or indirectly solicit, receive, or be in any manner concerned in soliciting or receiving, any assessment, subscription, or contribution for any political purpose whatever, from any other such officer, employee, or person."

This language is perfectly intelligible and clearly embraces the acts charged. Therefore there is no warrant for seeking refined arguments to show that the statute does not mean what it says, unless there is some reasonable doubt whether, so construed, it would be constitutional—the doubt that was felt by the Court below.

The doubt of the District Court seems to have come from the assumption that the source of power is to be found in Article I, Section 4, of the Constitution concerning the time, place and manner of holding elections, etc.; and from the decision that the control of party primaries is purely a State affair. *Newberry* v. *United States*, 256 U. S. 232. But the power of Congress over the conduct of officers and employees of the Government no more depends upon authority over the ultimate purposes of that conduct than its power to punish a use of the mails for a fraudulent purpose is limited by its inability to punish the intended fraud. *Badders* v. *United States*, 240 U. S. 391. It hardly needs argument to show that Congress may provide that its officers and employees neither shall exercise nor be subjected to pressure for money for political purposes, upon or by others of their

kind, while they retain their office or employment. If argument and illustration are needed they will be found in *Ex parte Curtis,* 106 U. S. 371, s. c. 12 Fed. 824. See *United States* v. *Thayer,* 209 U. S. 39, 42. Neither the Constitution nor the nature of the abuse to be checked requires us to confine the all embracing words of the Act to political purposes within the control of the United States.

It is argued at some length that the statute, if extended beyond the political purposes under the control of Congress, is too vague to be valid. The objection to uncertainty concerning the persons embraced need not trouble us now. There is no doubt that the words include representatives, and if there is any difficulty, which we are far from intimating, it will be time enough to consider it when raised by someone whom it concerns. The other objection is to the meaning of "political purposes." This would be open even if we accepted the limitations that would make the law satisfactory to the respondent's counsel. But we imagine that no one not in search of trouble would feel any. Whenever the law draws a line there will be cases very near each other on opposite sides. The precise course of the line may be uncertain, but no one can come near it without knowing that he does so, if he thinks, and if he does so it is familiar to the criminal law to make him take the risk. *Nash* v. *United States,* 229 U. S. 373.

It is said to be uncertain which of several sections imposes the penalty and therefore uncertain what the punishment is. That question can be raised when a punishment is to be applied. The elaborate argument against the constitutionality of the Act if interpreted as we read it, in accordance with its obvious meaning, does not need an elaborate answer. The validity of the Act seems to us free from doubt.

Judgment reversed.

MINERALS SEPARATION NORTH AMERICAN CORPORATION *v.* MAGMA COPPER COMPANY.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

No. 71. Argued January 9, 1930.—Decided February 24, 1930.

1. The effect of a patent as a disclosure depends on what is made known by the specification and is not limited to the precise scope of the claims. P. 402.
2. Patent No. 835,120, of the Minerals Separation, Ltd., (sustained by this Court, 242 U. S. 261; 250 U. S. 336), disclosed the general fact that oils and other substances having a preferential affinity for the metalliferous particles in ores, can be used to separate them, in a froth, from the gangue by mixing such substances with the pulverized ore in water and agitating the mixture, the particular substance most effective with the particular ore and the limit of the quantity of it to be used being determined by preliminary tests. P. 401.
3. This disclosure anticipated Patent No. 962,678, here in suit, which claims a similar process but relies on "mineral frothing agents" that dissolve in the water. The later patent cannot be sustained upon the ground that the selective substances referred to in the earlier one are oils and upon the assumption that oils function by coating the metalliferous particles and that the other substances function by "modifying the water." P. 403.
4. The rule attributing weight to the commercial success of a patent as evidence of invention, *held* inapplicable here on the special facts of the case. P. 404.

30 F. (2d) 67, affirmed.

CERTIORARI, 279 U. S. 832, to review a decree of the Circuit Court of Appeals, which reversed a decree of the District Court, 23 F. (2d) 931, in favor of the above-named petitioner in a suit for alleged infringement of its patent.

Messrs. Henry D. Williams and *William Houston Kenyon,* with whom *Messrs. Lindley M. Garrison, Frederic D. McKenney,* and *Sidney St. F. Thaxter* were on the brief, for petitioner.

Mr. William H. Davis, with whom *Mr. Merton W. Sage* was on the brief, for respondent.

MR. JUSTICE HOLMES delivered the opinion of the Court.

This is a suit for the infringement of Letters Patent, No. 962678, Claims 1 and 2, brought by the petitioner in the District Court of Maine, where the petitioner prevailed, 23 F. (2d) 931, the Court acting partly in deference to the decision of the Circuit Court of Appeals for the Third Circuit in *Miami Copper Co.* v. *Minerals Separation, Ltd.*, 244 Fed. 752. The decision of the District Court was reversed by the Circuit Court of Appeals for the First Circuit, 30 F. (2d) 67, and because of the conflict with the Third Circuit, a writ of certiorari was granted by this Court.

The claims are (1) for a "process of concentrating ores which consists in mixing the powdered ore with water containing in solution a small quantity of a mineral frothing agent, agitating the mixture to form a froth and separating the froth," and (2) the same as (1) except that it inserts the word 'organic' before 'mineral frothing agent.' The only defence that it is necessary to consider is that the disclosure is anticipated by the earlier patent, No. 835120, which has been before this Court in *Minerals Separation, Ltd.*, v. *Hyde,* 242 U. S. 261, and *Minerals Separation, Ltd.*, v. *Butte & Superior Mining Co.*, 250 U. S. 336. It is enough to refer to those cases without repeating them. The process described in 835120 "consists in mixing the powdered ore with water, adding a small proportion of an oily liquid having a preferential affinity for metalliferous matter, (amounting to a fraction of one per cent. on the ore), agitating the mixture until the oil coated mineral matter forms into a froth, and separating the froth from the remainder by flotation." The specification describes the object as being to separate metalliferous matter, &c., from gangue by means of oils,

fatty acids, " or other substances which have a preferential affinity for metalliferous matter over gangue." It refers to a previous patent to Cattermole by which a considerable amount of oil is used to form granules, and announces the discovery that if the proportion of oily substance is reduced to, say, a fraction of one per cent. on the ores, granulation ceases to take place, and on vigorous agitation the ore instead of sinking forms a froth on the surface that can be removed. The process is helped by the addition of a little acid, by warming and the fine pulverization of the pulp.

The petitioner, admitting that both patents are for processes, says that they are fundamentally different in their respective principles of action; that in the present patent, 962678, the mineral frothing agent is dissolved in the water and produces the metal-bearing bubbles, no one knows exactly how, by modifying the water; whereas in the earlier, 835120, oil is used which does not dissolve in the water but coats the particles of metal with a thin coating of oil, which it could not do if it were soluble, and thus shows its preferential affinity when shaken up with the metal pulp.

The question is not what is the precise scope of the claims in 835120, but what is disclosed in the specification and made known to the world. *Alexander Milburn Co.* v. *Davis-Bournonville Co.*, 270 U. S. 390. Therefore we are relieved of the inquiry whether the words 'oily liquid' in Claim (1) can be read as a shorthand expression for the previously mentioned oils 'and other substances which have a preferential affinity for metalliferous matter over gangue,' as 'oil' was expressly interpreted in earlier patents, including one to Cattermole referred to at some length in 835120, and as there is evidence that it thus was understood by men skilled in the art. It is disclosed that it was well known there were other substances besides oil that had the preferential affinity and

that could be used. The nature of the affinity is not specified and it cannot be confined to the kind of action shown by oil. It is neither said nor implied that the added element must be insoluble or that it must coat the metal, although it is assumed in accordance with the prevailing theory that the metal will be coated when the oil mentioned in the claims is used. All that is required is that in some effective way the other substance should pick the metal out. It is said that oil does it by coating the metal particles and that of course a substance in solution could not do that. There is no 'of course' as to what nature can do except as proved by observation and experiment. A substance in solution can combine chemically with another and become a solid. Whether a given thing will unite mechanically or whether by its presence it will promote an activity in which it does not share, is to be found out by trial, not by reasoning, and the petitioner agrees that in this case we do not know. It is a matter of reasoning rather than of observation that the oil coats the mineral particles. The experts differ whether the same thing does not take place when a soluble substance is used. But we agree with the defendant's argument that no one concerned in this business would care a straw as to the intimate nature of the action if it produced the result, and that No. 835120 was not describing the work of insolubles alone. It was not attempting to anticipate a theory of the invisible, but to tell how the practical end could be achieved with any of the different things named.

The discovery was that a very minute portion of the oil worked in an unexpectedly different way from that familiar with larger quantities—not in the matter of coating the particles, but in helping to produce a froth that floated instead of granules that sank, and thus in preserving the slime made by the smaller particles with the water, and so saving a large proportion of metal that

otherwise would have been lost. The fact was a general one. No particular oil was mentioned and the fact was not confined to oils. The public was directed to make a 'simple preliminary test to determine which oily substance yields the proportion of froth or scum desired.' The patent having been held good as to the oils although experiment was necessary to find out what oil would work best with a given ore, the disclosure was an anticipation although experiment might be necessary to choose among the substances having the required affinity the one that would produce the best result.

The petitioner adverts to the success that has attended the later patent and to the fact that the world waited until it appeared. But interlopers naturally would be slow to venture into the field occupied by a powerful company armed with patent No. 835120 and supported by a subtle ingenuity that we cannot doubt would have been exercised with even more effect to show that a process like that in No. 962678 was an infringement than it now is to prove that the later patent was a revelation that transformed the art.

Decree affirmed.

CHESAPEAKE & OHIO RAILWAY COMPANY *v.* BRYANT, ADMINISTRATOR.

CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA.

No. 113. Argued January 16, 17, 1930.—Decided February 24, 1930.

1. An action for wrongful death will not lie under the Federal Employers' Liability Act where the injury from which death resulted was inflicted two days after the employment of the decedent by the railway company had been terminated. P. 405.
2. The writ of certiorari should not issue to review a case in a state court as one governed by the Federal Employers' Liability Act, if judgment against the carrier was rested upon the state law, pursuant to a finding that the injured person's employment by

the carrier had ceased before the injury occurred, and if there was some evidence to support that finding. *Id.*
152 Va. 263, affirmed.

CERTIORARI, 279 U. S. 834, to review a judgment of the Supreme Court of Appeals of Virginia, affirming a recovery against the Railway Company in an action for death by wrongful act.

Mr. J. M. Perry for petitioner.

Mr. Charles Curry, with whom *Messrs. R. B. Stephenson* and *Curry Carter* were on the brief, for respondent.

MR. JUSTICE HOLMES delivered the opinion of the Court.

This is an action seeking to charge the petitioner for the death of the respondent's intestate, who was shot and killed by the foreman of a gang in which the deceased if not discharged would have worked. At the trial the petitioner demurred to the evidence, on the ground, among others, that at the time of the killing the parties were engaged in interstate commerce. The demurrer was overruled and the respondent (plaintiff) got judgment, which was affirmed by an equally divided Court. If the parties were governed by the Federal Employers' Liability Act the respondent might have difficulties from the decisions of this Court. *Davis* v. *Green,* 260 U. S. 349. *Atlantic Coast Line R. R. Co.* v. *Southwell,* 275 U. S. 64. But the deceased was killed on Monday, and there was some evidence that he had been discharged on the Saturday before. If so the Act of Congress did not govern and the parties were left to the State law, with which we have no concern. The writ of certiorari would not have been granted but for the impression that there was no doubt that the deceased was employed by the petitioner in interstate commerce up to the moment immediately preceding his death.

Judgment affirmed.

DAVIS, FEDERAL AGENT, ET AL. *v.* PRESTON, ADMINISTRATRIX.

CERTIORARI TO THE SUPREME COURT OF TEXAS.

No. 188. Argued January 23, 1930.—Decided February 24, 1930.

1. One who, as Federal Agent, suffered judgment in an action under the Employers' Liability Act for death of a railroad employee occurring during federal control, ceased to be liable and was without standing to invoke a review of the judgment when he ceased to be Federal Agent. P. 407.
2. When, in such a case, a writ of certiorari to a state supreme court was petitioned for by both the retired Federal Agent and the surety on his appeal bonds below, who had been adjudged to pay costs, and the certiorari was granted, *held:*

   (1) That the writ must be dismissed as to the main petitioner. P. 408.

   (2) That the adjudication of liability for costs, which had not been made a ground of complaint, did not enable the surety to complain of the judgment in other particulars. *Id.*

   (3) That the Federal Agent's successor in office could not be substituted in this court upon motion made after the statutory time within which he might have invoked a review of the judgment by certiorari had expired. *Id.*
3. The provisions relating to substitution, which were added to § 206 of the Transportation Act by Act of March 3, 1923, do not enable a former Federal Agent to invoke a review by this Court of a judgment which is of no legal concern to him, nor do they modify or enlarge the statutory period for invoking the reviewing powers of this Court. *Id.*

Certiorari to 118 Tex. 303, dismissed.

CERTIORARI, *post*, p. 539, to review a judgment of the Supreme Court of Texas affirming a judgment against the Federal Agent in an action under the Federal Employers' Liability Act.

Mr. W. L. Cook, with whom *Mr. Sidney F. Andrews* was on the brief, for petitioners.

Mr. Robert L. Cole, with whom *Mr. James W. Wayman* was on the brief, for respondent.

Mr. Justice Van Devanter delivered the opinion of the Court.

This proceeding relates to an action brought in a state court of Texas to recover for the death of a railroad employee occurring during federal control,—while the railroad was being operated by the Director General. The action was begun by the deceased's widow, in her personal right, against Walker D. Hines, as Director General; but by amendments and substitutions the action came to be one prosecuted under the Federal Employers' Act of 1908, c. 149, 35 Stat. 65, by the widow, as administratrix of the deceased's estate, against James C. Davis, as Federal Agent. Judgment went against the latter, and on successive appeals there was an affirmance by the Court of Civil Appeals and the Supreme Court of the State. The final affirmance included a provision adjudging the corporate surety on the appeal bond jointly liable with Davis, as Federal Agent, for the costs in the two appellate courts.

Within the allotted three months Davis, describing himself as Federal Agent, and the surety company petitioned this Court for a review on certiorari, and the petition was granted.

It now appears that when the petition was presented Davis had ceased to be Federal Agent and had been succeeded in that office by Andrew W. Mellon,—thereby making the judgment unenforceable against Davis and possible of satisfaction only after the substitution of his successor, Mellon. Therefore Davis was not then in a position to complain of the judgment or to invoke a review of it by this Court. All right and discretion to do either had passed to his successor in office. *Florida ex*

rel. Wailes v. *Croom,* 226 U. S. 309; *Taylor* v. *Savage,* 1 How. 282, 286; *Dolan* v. *Jennings,* 139 U. S. 385, 387; *McClane* v. *Boon,* 6 Wall. 244.

It follows that the writ of certiorari granted on the petition of Davis was improvidently allowed and must be dismissed. The fact that the surety company joined in the petition can not alter the result. While the company was adjudged liable for the costs in the two appellate courts, that feature of the judgment of affirmance is not made a ground of complaint. Nor does it enable the company to complain of the judgment in other particulars. *Smith* v. *Indiana,* 191 U. S. 138, 149–150.

A motion is now made by Andrew W. Mellon, as Federal Agent, for his substitution in the present proceeding in the place of Davis. But the motion must be denied. The succession in office, as now appears, occurred before there was any effort to obtain a review in this Court. After the succession Davis was completely separated from the office and without right to invoke such a review or exercise any authority or discretion in that regard. Therefore his petition must be disregarded. The time within which such a review may be invoked is limited by statute and that time has long since expired. To grant the motion in these circumstances would be to put aside the statutory limitation and to subject the party prevailing in the state court to uncertainty and vexation which the limitation is intended to prevent.

The provisions relating to substitution which were added to section 206 of the Transportation Act of 1920 by the act of March 3, 1923, c. 233, 42 Stat. 1443, are cited in support of the motion. But, even when they are liberally construed, as they probably should be, they disclose no purpose either (a) to enable a former Federal Agent to invoke a review by this Court of a judgment which is of no legal concern to him, or (b) to modify or

enlarge the prescribed statutory period for invoking the reviewing power of this Court.

Motion for Substitution denied.
Writ of Certiorari dismissed.

COOPER *v.* UNITED STATES.

CERTIORARI TO THE COURT OF CLAIMS.

No. 93. Argued January 15, 1930.—Decided February 24, 1930.

The Revenue Act of November 23, 1921, effective from the beginning of that calendar year, provides, § 202 (a) (2), that, in ascertaining the gain from a sale of property acquired after February 28, 1913, the basis shall be the cost, and that in case of property acquired by gift after December 31, 1920, "the basis shall be the same as that which it would have in the hands of the donor or the last preceding owner by whom it was not acquired by gift." In November, 1921, A gave to B shares which A had bought in 1918 and which had increased in value. B sold them at that increased value within a week and was taxed on the basis of the difference between the price paid by A and the price received by B. *Held:*

1. The statute intends to reach the transaction retroactively. P. 411.

2. As so applied it is not invalid under the due process clause of the Fifth Amendment. *Id.*

Affirmed.

CERTIORARI, *post*, p. 537, to review a judgment of the Court of Claims rejecting a claim for recovery of money exacted as an income tax.

Mr. Wayne Johnson for petitioner.

Solicitor General Hughes, with whom *Assistant Attorneys General Youngquist* and *Galloway*, *Messrs. Sewall Key*, *J. Louis Monarch*, and *John Vaughan Groner*, Spe-

cial Assistants to the Attorney General, *Lisle A. Smith* and *Henry A. Cox* were on the briefs, for the United States.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

Petitioner paid income taxes assessed according to her return for the calendar year 1921; thereafter, by suit in the Court of Claims she sought to recover a portion of the same ($8,474.90) with interest, which she alleged had been improperly exacted.

Her return showed $36,670.00 as gain derived from the sale of 380 shares of bank stock sold November 7, 1921, at $210.00 per share. She acquired this stock November 1, 1921, by gift from her husband. On that day its fair market value was $210.00 per share; in 1918 it cost her husband $113.50 per share.

The challenged assessment was made under Section 202 (a) (2), Revenue Act, November 23, 1921, effective (Sec. 263) January 1, 1921. Chap. 136, 42 Stat. 227, 229.

"Sec. 202 (a). That the basis for ascertaining the gain derived or loss sustained from a sale or other disposition of property, real, personal, or mixed, acquired after February 28, 1913, shall be the cost of such property; except that— . . .

"(2) In the case of such property, acquired by gift after December 31, 1920, the basis shall be the same as that which it would have in the hands of the donor or the last preceding owner by whom it was not acquired by gift. . . . In the case of such property acquired by gift on or before December 31, 1920, the basis for ascertaining gain or loss from a sale or other disposition thereof shall be the fair market price or value of such property at the time of such acquisition. . . ."

The Court of Claims decided against the petitioner; and the cause is here upon certiorari. She maintains—

First, that Sec. 202 (a) (2) should not be construed as applicable to transactions fully completed before enactment of the statute. Second, that if construed to apply where both gift and sale were consummated before such enactment the section is arbitrary and capricious and, therefore, invalid under the due process clause of the Fifth Amendment.

To support the first point *Shwab* v. *Doyle,* 258 U. S. 529, is cited; for the second *Nichols* v. *Coolidge,* 274 U. S. 531; *Blodgett* v. *Holden,* 275 U. S. 142; *Untermyer* v. *Anderson,* 276 U. S. 440, are relied upon.

We think the purpose of Congress to apply the provisions of Sec. 202 (a) (2) to the transaction here involved is clear. *Shwab* v. *Doyle* grew out of the Revenue Act of Sept. 8, 1916. There, after considering the relevant circumstances, we declared there was no intention to give retroactive effect to the enactment. Here, the contrary design is not doubtful.

The power of Congress to tax as part of a donee's income the difference between what the gift cost the donor and the price received therefor when sold by the donee was affirmed in *Taft* v. *Bowers,* 278 U. S. 470, and is not now denied.

That the questioned provision can not be declared in conflict with the Federal Constitution merely because it requires gains from prior but recent transactions to be treated as part of the taxpayer's gross income has not been open to serious doubt since *Brushaber* v. *Union Pacific R. Co.,* 240 U. S. 1, and *Lynch* v. *Hornby,* 247 U. S. 339.

Nichols v. *Coolidge,* 274 U. S. 531, held arbitrary and capricious a statute which required executors to pay an excise ostensibly laid upon the transfer of property by death, but reckoned upon its value plus the value of other property conveyed by the decedent before the enactment in entire good faith and without contemplation of death, and said that to enforce it would amount to confiscation.

Blodgett v. *Holden*, 275 U. S. 142, and *Untermyer* v. *Anderson*, 276 U. S. 440, considered the validity of an enactment which laid a tax upon donors because of gifts fully consummated prior to its passage. We held this was beyond the power of Congress. None of these cases is in point; they gave no consideration to the power of Congress to require that taxable income should include profits from transactions consummated within the year.

We can find nothing unusual, arbitrary or capricious in the provision of the taxing Act here involved, and the judgment of the court below must be affirmed.

Affirmed.

UNITED STATES *v.* AMERICAN CAN COMPANY.

UNITED STATES *v.* MISSOURI CAN COMPANY.

UNITED STATES *v.* DETROIT CAN COMPANY.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

Nos. 128, 129, 130. Argued January 21, 1930.—Decided February 24, 1930.

1. The Act of September 8, 1916, § 13, par. (d), in providing that a corporation which keeps its accounts upon any basis other than that of actual receipts and disbursements, may, subject to regulations, make its income return upon the basis of its accounts unless that basis does not clearly reflect the income, refers to the general bookkeeping system followed by the taxpayer and not to the accuracy or propriety of mere individual items or entries upon the books. P. 419.
2. Therefore, where the books of corporations, kept upon the accrual basis, and returns upon that basis, contained excessive inventory valuations and thereby indicated net incomes much too small, the Commissioner of Internal Revenue properly corrected the erroneous valuations and made reassessments upon the returns as so modified. His rejection of the errors was not a rejection of the basis upon

which the returns were made, and did not make it necessary that the reassessment be based on actual receipts and disbursements. *Id.* 31 F. (2d) 730, reversed.

CERTIORARI, *post,* p. 538, to review judgments of the Circuit Court of Appeals, which affirmed recoveries in the District Court, 20 F. (2d) 970, in actions against the United States for moneys collected as income and excess profits taxes. See also, *Aluminum Castings Co.* v. *Routzahn,* 31 F. (2d) 669.

Solicitor General Hughes, with whom *Assistant Attorneys General Willebrandt* and *Youngquist* and *Messrs. Millar E. McGilchrist, Claude R. Branch, Sewall Key, J. Louis Monarch,* and *Thomas J. Crawford,* Special Assistants to the Attorney General, were on the briefs, for the United States.

I. The question whether the correction made by the Commissioner in the returns amounted to a rejection of the basis upon which the accounts were kept involved the application of reasoning to the uncontroverted facts and hence presented a question of law which is reviewable here. If material, the question whether the findings of the amounts of respondents' tax liabilities when computed on the cash basis are supported by evidence is also open to review.

II. The entire dispute arises out of the Commissioner's treatment of the inventory item. Respondents kept their accounts on the accrual basis and treated all items consistently with the exception of the inventory of tin plate. The market price of tin plate rose sharply in the early part of 1917 from $3.60 per base box to $7. Respondents took advantage of this increase in value of stocks on hand by writing up as of January 1, 1917, to $7 per base box their opening inventories of tin plate which had cost them but $3.60 per box. Since the effect of this was to increase

the cost of goods sold as shown on their returns and resulted in an understatement of net income, the Commissioner eliminated this artificial inflation of the cost of goods sold and made additional assessments. The courts below have held that this action of the Commissioner amounted to a rejection by him of the basis upon which respondents' accounts were kept and that the necessary consequence of this rejection was to require that the tax be computed on the cash basis. We submit that the decision of the court below puts too narrow a construction upon the statute and sanctions a result which Congress never intended.

The statute authorizes the filing of a return on the basis of the taxpayer's accounts unless such basis does not clearly reflect his income. Respondents kept their accounts and filed their returns on the accrual basis. Even if it should be held that the Commissioner rejected the basis upon which respondents' accounts were kept, we submit that, since there is no finding that the basis upon which respondents kept their accounts and filed their returns did not clearly reflect income, the findings do not support the judgment.

III. The findings of the amounts of respondents' net incomes on the cash basis are not supported by evidence.

Mr. Graham Sumner, with whom *Messrs. L. A. Welles, John J. Treacy,* and *Adrian McCalman* were on the briefs, for respondents.

I. The Revenue Act of 1917 provided that the income of every corporation should be determined upon the basis prescribed in § 12 of the Act, except in cases where a corporation kept its accounts and made its return upon some other basis which clearly reflected its income and complied with the Regulations made by the Commissioner with the approval of the Secretary of the Treasury.

II. The plaintiffs did not keep their accounts or make their returns for 1917 upon a basis which clearly reflected

their incomes and complied with the Regulations made by the Commissioner with the approval of the Secretary of the Treasury.

III. The findings of fact established the net incomes of the plaintiffs upon the basis prescribed in § 12 of the Revenue Act and are fully supported by the evidence.

IV. The plaintiffs are entitled to judgments for the amounts of the taxes paid in excess of the amounts payable upon the cash basis, with interest at the rate of six per cent. per annum from the dates of payment to a date preceding the date of the refund check by not more than thirty days, such date to be determined by the Commissioner of Internal Revenue.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

In the courts below these causes were heard together and one opinion here will suffice.

Respondent, The American Can Company, owned the entire capital stock of respondents Missouri Can Company and Detroit Can Company. All were incorporated under the laws of New Jersey and had their legal residences and principal offices therein. Their places of business were within the Second United States Internal Revenue District of New York. William H. Edwards, formerly Collector for that District, retired in 1921; Frank K. Bowers succeeded him. During Edwards' term he demanded and collected from these three corporations income and excess profits taxes for 1917 aggregating more than $5,200,000. Thereafter Collector Bowers exacted of them above $3,300,000 as additional income and excess profits taxes for the same year.

In January, 1926, respondents instituted actions against the United States in the District Court for New Jersey, as permitted under U. S. Code, Title 28, Sec. 41, par.

20 (Judicial Code, Sec. 24, par. 20; Revenue Act, Nov. 23, 1921, c. 136, Sec. 1310 (c), 42 Stat. 311; Revenue Act, February 24, 1925, c. 309, 43 Stat. 972). They sought to recover with interest more than $2,700,000 paid, as they alleged, to Edwards in excess of taxes properly assessable to them for 1917. Judgments against the United States for the amounts claimed were affirmed by the Circuit Court of Appeals, Third Circuit, March 5, 1929; and the matter is here upon certiorari.

They also sued Bowers, Collector, in the District Court, Southern District of New York, to recover the additional taxes for 1917 ($3,300,000) demanded by and paid to him. These suits involved the same questions as those presented in the causes now before us. Judgments went for Bowers, Collector. The Circuit Court of Appeals, Second Circuit, affirmed them November 4, 1929.

The opinions and judgments in the two Circuits upon the same facts are thus in direct conflict.

Pertinent provisions of the statutes and Treasury Regulations are printed in the margin.*

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* The Revenue Act of September 8, 1916, Sec. 10, imposed taxes reckoned upon the amount of income.

The Act of October 3, 1917, c. 63, 40 Stat. 300, 302, 303, 305, increased the income tax rates; also imposed an excess profits tax. It provided—

Title I, Sec. 4. "That in addition to the tax imposed by subdivision (a) of section ten of such Act of September eighth, nineteen hundred and sixteen, as amended by this Act, there shall be levied, assessed, collected, and paid a like tax of four per centum upon the income received in the calendar year nineteen hundred and seventeen and every calendar year thereafter, by every corporation, joint-stock company or association, or insurance company, subject to the tax imposed by that subdivision of that section. . . .

"The tax imposed by this section shall be computed, levied, assessed, collected, and paid upon the same incomes and in the same manner as the tax imposed by subdivision (a) of section ten of such Act of September eighth, nineteen hundred and sixteen, as amended by this Act, except, &c. . . .

The accounts of respondents were kept during 1917 not upon the basis of actual receipts and disbursements but upon the accrual basis—that is, pecuniary obligations

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Title II, Sec. 201. "That in addition to the taxes under existing law and under this act there shall be levied, assessed, collected, and paid for each taxable year upon the income of every corporation, partnership, or individual, a tax (hereinafter in this title referred to as the tax) equal to the following percentages of the net income: . . .

"Sec. 206. That for the purposes of this title the net income of a corporation shall be ascertained and returned . . . (c) for the taxable year upon the same basis and in the same manner as provided in Title I of the Act entitled 'An Act to increase the revenue, and for other purposes,' approved September eighth, nineteen hundred and sixteen, as amended by this Act, except . . ."

The Act of September 8, 1916, 39 Stat. 756, 765, 766, 767, 770, 771, c. 463. provided—

Title I, Sec. 10. "That there shall be levied, assessed, collected, and paid annually upon the total net income received in the preceding calendar year from all sources by every corporation, joint-stock company or association, or insurance company, organized in the United States, no matter how created or organized but not including partnerships, a tax of two per centum upon such income; . . .

"Sec. 12 (a). In the case of a corporation, joint-stock company or association, or insurance company, organized in the United States, such net income shall be ascertained by deducting from the gross amount of its income received within the year from all sources" [Expenses, losses, interest, taxes.]

"Sec. 13 (a). The tax shall be computed upon the net income, as thus ascertained, received within each preceding calendar year ending December thirty-first: . . .

"(b) Every corporation, joint-stock company or association, or insurance company, subject to the tax herein imposed, shall, on or before the first day of March, nineteen hundred and seventeen, . . . render a true and accurate return of its annual net income in the manner and form to be prescribed by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, and containing such facts, data, and information as are appropriate and in the opinion of the commissioner necessary to determine the correctness of the net income returned and to carry out the provisions of this title. The return shall be sworn to by the president, vice-presi-

payable to or by the Company were treated as if discharged when incurred. Purporting to proceed as permitted by Sec. 13 (d), Title I, Revenue Act of 1916, they made returns to the Collector upon the same basis. The Commissioner ascertained that the books showed excessive inventory values and thereby indicated net incomes much too small. The valuation placed on large quantities of tin plate had been marked up from $3.60 per box to $7.00, and the higher rather than the lower cost of this raw material had been reported. Thereupon, he dis-

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dent, or other principal officer, and by the treasurer or assistant treasurer. The return shall be made to the collector of the district in which is located the principal office of the corporation, company, or association, where are kept its books of account and other data from which the return is prepared, . . .

"(d). A corporation, joint-stock company or association, or insurance company, keeping accounts upon any basis other than that of actual receipts and disbursements, unless such other basis does not clearly reflect its income, may, subject to regulations made by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, make its return upon the basis upon which its accounts are kept, in which case the tax shall be computed upon its income as so returned; . . ."

Treasury Decision No. 2609, promulgated December 19, 1917—

"(1). For the purposes of income and excess-profits tax returns, inventories of merchandise, etc., and of securities will be subject to the following rules:

"A. Inventories of supplies, raw materials, work in process of production, and unsold merchandise must be taken either (a) at cost or (b) at cost or market price, whichever is lower, provided that the method adopted must be adhered to in subsequent years, unless another be authorized by the Commissioner of Internal Revenue.

. . . .

"C. Gain or loss resulting from the sale or disposition of assets inventoried as above must be computed as the difference between the inventory value and the price or value at which sold or disposed of.

"(2). In all other cases inventories must be taken at cost or at value as of March 1, 1913, as the case may be."

allowed the inflation, corrected the erroneous entries and made reassessments according to the returns so modified. Respondents claimed that this action amounted to rejection of the basis upon which their returns had been made. Also, that, after such rejection, no assessment could be made except one based upon receipts and disbursements; that is, upon amounts ascertained by deducting from gross income received, expenses paid out, losses charged off, interest, and taxes (Sec. 12, Act 1916). And further, that computation should be made without regard to inventories.

The District Court for New Jersey and the Circuit Court of Appeals, Third Circuit, accepting respondents' view, awarded and approved judgments against the United States aggregating some four million dollars. The result, we think, is manifestly erroneous. Upon the findings, judgments should have gone the other way.

The claims of respondents rest upon improper construction of par. (d), Sec. 13, Act. of Sept. 8, 1916. This provides that "a corporation . . . keeping accounts upon any basis other than that of actual receipts and disbursements, unless such other basis does not clearly reflect its income, may, subject to regulations . . . make its return upon the basis upon which its accounts are kept, in which case the tax shall be computed upon its income as so returned; . . ."

"Basis of keeping accounts" as there used refers to the general bookkeeping system followed by the taxpayer and not to the accuracy or propriety of mere individual items or entries upon the books. And to correct an improper item in a return—whether the result of mere error or designed—cannot properly be said to constitute rejection of the basis upon which the return was constructed. The statute empowers tax officers to make necessary rules and regulations and to take action essential to orderly

enforcement of the obligations imposed. Here, the taxpayers kept their accounts on the accrual basis and elected to make their returns accordingly. They cannot complain because an item therein was changed so as to conform with admitted facts. If their returns had been made on the basis of actual receipts and disbursements certainly they would have been subject to correction for errors without changing the basis; and the same thing is true of returns framed upon an accrual basis.

United States v. *Anderson,* 269 U. S. 422, 437, 440, 443, considered the meaning of Sec. 12 (a) and 13 (d), Act of 1916, and sustained the action of the Commissioner who had reassessed according to an adjusted return originally made upon the accrual basis.

We need not discuss the question whether under any circumstances the taxable income of a manufacturing or mercantile corporation can be ascertained without reference to inventory values. Certainly, in most instances where the taxpayer carries on an extensive business this cannot be done.

The challenged judgments are reversed. The causes will be remanded to the District Court for appropriate action in harmony with this opinion.

Reversed.

TAGG BROS. & MOORHEAD ET AL. *v.* UNITED STATES ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

No. 45. Argued October 23, 1929.—Decided February 24, 1930.

1. The Packers and Stockyards Act of August 15, 1921, § 301, declares that persons engaged in the business of buying and selling in interstate commerce livestock at a stockyard on a commission basis are "market agencies." Section 310 provides that when-

ever, after a full hearing, the Secretary of Agriculture is of opinion that any rate "of a stockyard owner or market agency" is unreasonable, he may (*a*) fix the charge to be thereafter observed and (*b*) make an order that "such owner or operator" shall not thereafter "collect any rate or charge for the furnishing of stockyard services other than the rate or charge so prescribed." *Held,* construing these with other provisions of the Act, and with regard to its legislative and executive interpretation, that market agencies are within § 310 (b), the term "operator" being an apt designation of such an agency. P. 435.

2. The market agencies at the Omaha Stockyards are owned by corporations, partnerships and individuals, distinct from the corporation owning the stockyards. Their specific work does not require them to invest much capital, but involves the use of space and facilities in the stockyards, the charges for which, paid to the stockyards corporation, are ultimately borne by their customers. They perform an indispensable service as brokers in the buying and selling of livestock in interstate commerce; enjoy a substantial monopoly of that business at the Omaha yards, and, by agreement among themselves, have fixed uniform rates for their services, regardless of differences in experience, skill and industry. *Held:*

(1) The rates of such market agencies are subject to regulation, under authority of Congress, to prevent their services from becoming an undue burden upon, or obstruction of, interstate commerce. Pp. 436–9.

(2) Such regulation is not an attempt to fix wages or limit anyone's net income, and does not violate the due process clause. P. 439.

(3) The mere division of the stockyard services between the stockyards corporation and the market agencies, does not deprive Congress of a power of regulation which it otherwise would have had. P. 438.

(4) There is nothing in the nature of monopolistic personal services which makes it impossible to fix reasonable charges therefor; and there is nothing in the Constitution which limits the Government's power of regulation to businesses which employ substantial capital. *Id.*

(5) Whether a business is affected with a public interest depends, not upon the amount of capital it employs, but upon the character of the service which those who are conducting it engage to render. P. 439.

3. A notice from the Secretary of Agriculture informing market agencies of a hearing to be held under Title III of the Packers and Stockyards Act to inquire into the reasonableness of a new schedule of rates, which had been filed by them and had been suspended, and apprising them that they would have "the right to appear and show cause why a further order in respect of the said schedule of rates and charges should not be made," pursuant to Title III, *held* sufficient to put such respondents on notice that rates lower than those in either the proposed or the existing schedules might be fixed by the Secretary under §§ 306 (e) and 310, upon the evidence to be adduced at the hearing. P. 439.
4. Evidence before the Secretary of Agriculture, *held* sufficient to support his findings and conclusion relative to the reasonableness of the rates of market agencies. P. 440.
5. Mere admission by an administrative tribunal of matters which, under the rules of evidence applicable to judicial proceedings, would be deemed incompetent, or mere error in reasoning upon evidence adduced, does not invalidate an order made by it. P. 442.
6. An order fixing rates of market agencies under the Packers and Stockyards Act must be set aside if it rests upon an erroneous rule of law, or is based upon a finding made without evidence, or upon evidence which clearly does not support it. But the order here assailed is not subject to these infirmities. *Id.*
7. A failure of the Secretary of Agriculture to give due notice of a hearing on such rates would be ground only for setting aside the resulting rate-fixing order as having been made irregularly; it would not justify trying in court, upon new evidence, issues respecting the merits of the order. *Id.*
8. A proceeding under § 316 of the Packers and Stockyards Act is a judicial review, not a trial *de novo*. P. 443.
9. In such review, the validity of the order of the Secretary must be determined upon the record of the proceedings before him, save as there may be an exception of issues presenting claims of constitutional right. On all other issues, his findings must be accepted as conclusive, if the evidence before him was legally sufficient to sustain them and there was no irregularity in the proceeding. *Id.*
10. It is within the power of the Secretary, and it is his duty, to modify his order if new evidence warrants the change. A rate order is not *res judicata*. P. 445.
11. Whether new evidence may be taken in the court reviewing the order, on the issue of confiscation, is a question of practice not

necessary to be determined where the claim of confiscation is not sustained by the evidence as received by the Secretary or as added to in the court. P. 445.

29 F. (2d) 750, affirmed.

APPEAL from a final decree of the District Court, of three judges, in a suit under the Packers and Stockyards Act, to enjoin the enforcement of an order of the Secretary of Agriculture prescribing a tariff of maximum charges for the services of market agencies at the Omaha Stockyards. The decree dissolved an interlocutory injunction and dismissed the bill.

Messrs. Francis A. Brogan and *James M. Beck,* with whom *Messrs. Alfred G. Ellick, Anan Raymond, J. S. Boyd,* and *Challen B. Ellis* were on the briefs, for appellants.

Congress has no power to fix prices for purely personal services (such as that of the commission men, for grading and selling cattle). The question is similar to that presented in the "Minimum Wage Cases," *Adkins* v. *Children's Hospital,* 261 U. S. 525, *Murphy* v. *Sardell,* 269 U. S. 530; in the "Kansas Industrial Court Cases," *Wolff Co.* v. *Industrial Court,* 262 U. S. 522; in the "Ticket Brokers Cases," *Weller* v. *New York,* 268 U. S. 319, *Tyson & Bro.* v. *Banton,* 273 U. S. 418; and in the "Employment Agency Case," *Ribnik* v. *McBride,* 277 U. S. 350.

The commissions are only wages for the labor of the commission men. The Secretary of Agriculture so found and the testimony is uncontradicted. The business is wholly one of skill and labor, with the elements of capital or other property investment negligible.

These commission men are not employees or owners of the stockyards and have no interest, direct or indirect, in the profits of the stockyards, or their "yardage"

charges, nor has the stockyards any share of the compensation of the commission men.

As in all skilled labor, the commission men differ between themselves in the length of their experience, their relative aptitude for the work and their individual industry. To prescribe a common maximum of earning power is to penalize the skillful for the benefit of the unskillful.

We may put aside the theories which support the power of the State to protect itself by those regulations directly affecting the public health, safety or morals, and only indirectly affecting property rights and rights of individual liberty. For we are dealing here with a more limited field of governmental activity, *Tyson & Bro.* v. *Banton,* 273 U. S. 418, 431—the rate-making power, the exercise of which does, primarily and admittedly, affect individual property rights and individual liberty to earn a living; which does (whatever its justification in the supposed public interest,) obviously and intentionally, constitute a redistribution of wealth, a "leveling of inequalities of fortune by depriving one who has property, of some part," a "compulsory exaction" from one for the support of another, a taking, directly, of some part of the property (wages, salary, income, return on investment, etc.) from A and handing it over to B. *Coppage* v. *Kansas,* 236 U. S. 1, 18; *Adkins* v. *Children's Hospital,* 261 U. S. 525, 557. To quote Jefferson's phrase in his first inaugural, this fixing of wages for personal service "takes from the mouth of labor the bread it has earned."

In this field of legislation the principles which govern the constitutionality of the exercise of the power are now well settled.

The first of these is that immunity from price-fixing is the rule and not the exception. This thought has been voiced and reiterated in every expression on the subject by this Court from the earliest to the latest. *Patterson* v.

Bark Eudora, 190 U. S. 169; *Adair* v. *United States,* 208 U. S. 161; *Ribnik* v. *McBride,* 277 U. S. 350.

The second of these principles is that the guaranties against deprivation of liberty and property in the Bill of Rights are not to be swept away or impaired by the other provisions of the Constitution granting specific powers to Congress, such as the commerce clause. *Monongahela Navigation Co.* v. *United States,* 148 U. S. 312, 336; *Adair* v. *United States,* 208 U. S. 161, 180; *Wilson* v. *New,* 243 U. S. 332, 347.

The third principle is that desirability of the legislation as a speedy remedy for the supposed evils, and the difficulty of dealing with the supposed evils by other methods, constitute no warrant for resort to price-fixing. *Hurtado* v. *California,* 110 U. S. 516; *Bailey* v. *Drexel Furniture Co.,* 259 U. S. 20, 37; *Pennsylvania Coal Co.* v. *Mahon,* 260 U. S. 394; *Tyson & Bro.* v. *Banton,* 273 U. S. 418–442; *Ribnik* v. *McBride,* 277 U. S. 350, 358.

The fourth principle is that price-fixing, being a direct taking of property for a supposed public benefit, can not be resorted to unless "just compensation" is given in return, and that just compensation requires an adequate and reasonable return upon the fair market value of that which is devoted to public use, or, as it is sometimes expressed, "affected with a public interest." *Smyth* v. *Ames,* 169 U. S. 466; *Cotting* v. *Kansas City Stockyards,* 183 U. S. 79, 91; *New York* v. *Public Service Commission,* 269 U. S. 244, 248; *Board* v. *N. Y. Telephone Co.,* 271 U. S. 23; *Ohio Valley Water Co.* v. *Ben Avon Borough,* 253 U. S. 287.

These principles suggest the vital distinctions, from the constitutional standpoint, in all legislative price-fixing between property and the use of property, on the one hand, and personal services, on the other.

First, property originates with the State and reverts to the State (*Commonwealth* v. *Alger,* 7 Cush. 84; *Holden*

v. *Hardy,* 169 U. S. 366, 392); it is held in a sense at the will of the State. Liberty is not held at the will of the State; its existence is a prerequisite to the very organization of a government of the people such as ours, and the liberty that is meant in the Constitution is not merely the freedom from physical restraint—it includes liberty to work for a living by using the powers of brain and muscle; indeed, that is of the very essence of liberty protected in the Bill of Rights. *Truax* v. *Raich,* 239 U. S. 33, 41.

Second, property may be taken by the State for public use. But liberty—personal services—may not be taken by the State for public use or any other use except as a punishment for crime or in a time of war.

Third, property, in our theory of government, always has its equivalent in money or other thing of value.

But liberty has no actual or theoretical equivalent in money. The skill of the artist can not be compensated for by substituting the skill of the poet. The lawyer can not have his personal services as a lawyer taken away and receive just compensation by being allowed to practice medicine.

When prices are fixed for personal services, there is no capital invested upon which an adequate and just return may be calculated.

Fourth, when personal services are regulated by price-fixing, there can be no equivalent offered and the constitutional guaranty can not be fulfilled.

Fifth, it follows from these rules as to property and as to personal services that, just as property may be taken for a public use, so by the manner of its use it may, under certain circumstances, be said to have been dedicated to a public use or devoted to a public use or used in such a way that the public has an interest in its use, and thus arises a right to fix rates; but, by like token, personal services which can not be taken for a public use, also, by their

very nature, can not be said to be dedicated to a public use or devoted to a public purpose, whatever may be the manner in which they are used, and whether the characterization of "public use" is by judicial reasoning or legislative declaration. *Ribnik* v. *McBride,* 277 U. S. 350; *Wolff* v. *Industrial Court,* 262 U. S. 522, 539.

It follows from these distinctions between property and personal services that the very basis for legislative price control, the *sine qua non* of the exercise of the rate-making power, is wholly absent in the case of personal services, wherever they may be performed, in connection with whatever business they may be given, regardless of the public interest, and regardless of whatever grant of power in the Constitution is claimed to support the regulation.

The essential differences between "property" and "personal services" have their basis in the Constitution. "Property" and "liberty" may not be taken without due process of law, is the mandate of the Constitution, but in the same provision is the authority to take property upon the payment of "just compensation." Thus, property may be taken (a) by due process, that is, by determining in the usual methods the public need, etc., and (b) upon paying fair value, or, in case the taking is by price-fixing, an adequate return on the property devoted to a public use. Liberty, including personal services, can be taken by due process only, that is, by determining the commission of the crime for which punishment is required.

A review of all the leading cases in this Court on the subject will show that these contentions are consistent with the conclusion in every single case, without exception. Citing cases mentioned *supra* and: *Frisbie* v. *United States,* 157 U. S. 160; *Knoxville Iron Co.* v. *Harbison,* 183 U. S. 13; *Muller* v. *Oregon,* 208 U. S. 412; *McLean* v. *Arkansas,* 211 U. S. 539; *Riley* v. *Massachusetts,* 232

U. S. 671; *Erie R. Co.* v. *Williams*, 233 U. S. 685; *Miller* v. *Wilson*, 236 U. S. 373; *Bunting* v. *Oregon*, 243 U. S. 426; *Adams* v. *Tanner*, 244 U. S. 590; *Radice* v. *New York*, 264 U. S. 292.

II. The statute itself confers no power upon the Secretary to make an order compelling a market agency to follow the rate schedule prescribed by him.

The court has full power to review the Secretary's order and determine not only whether it was within the powers conferred upon him, but also whether or not it was unsupported by substantial evidence, whether it disregarded undisputed evidence, and whether, considering the evidence as a whole, it deprived appellants of their constitutional rights.

III. The rates prescribed in the order are unreasonable, non-compensatory and unfair, and confiscate petitioners' property rights in the capital used in their businesses, and in the skill, experience and personal services devoted thereto. The order disregards accepted standards of rate-making. It not only adopts an inherently fallacious standard, but proceeds by erroneous and unconstitutional methods to arrive at a theoretical selling cost, in disregard of the actual facts. It disallows reasonable and necessary expenses without proof of abuse of discretion by appellants. It omits items of basic cost, essential to a valid rate. It is based upon irrelevant considerations of the economic situation of appellants' patrons, invokes questions of public policy having no connection with the inherent reasonableness of appellants' rates, and is based upon complete misunderstanding of appellants' economic function, and complete disregard of the really controlling factors in the industry they serve. It is based upon the unconstitutional theory of deliberate elimination by rate-making of established industries. It justifies radical reductions on the theory of purely speculative increases which the undisputed evidence shows cannot be realized. It arbitra-

rily selects the market served by appellants as a place to begin commission rate revision, notwithstanding the vital relation of the markets with each other, and in disregard of precedents established by the Secretary himself. It prescribes a rate which is generally unreasonable, considered in relation to the record as a whole and the general situation disclosed thereby. It ruins many appellants outright, and deprives the remainder of the chance to earn a fair living in the vocation to which their whole lives have been devoted, and their right to follow which is both an inherent and a vested one. Even the cost of service theory, properly applied, with a reasonable profit added, would result in a rate base which makes Tariff No. 2 unquestionably reasonable.

Assistant to the Attorney General O'Brian, with whom *Solicitor General Hughes* and *Messrs. George C. Butte, H. B. Teegarden* and *Charles H. Weston,* Special Assistants to the Attorney General, were on the brief, for appellees.

I. The order of the Secretary fixing appellant's maximum commission charges is authorized by the Act.

Even if subdivision (b) of § 310 does not include market agencies, the Secretary's determination and prescription of maximum reasonable charges of market agencies authorized by subdivision (a) constitutes an "order" within the meaning of subdivision (e) of § 306. Its express provisions are partially nullified if it is construed as not permitting any enforceable order to market agencies.

This interpretation is in harmony with the manifest intent and purpose of the Act to make regulation of charges for stockyard services complete and effective.

II. The authority conferred upon the Secretary does not violate the due process clause of the Fifth Amendment. *Stafford* v. *Wallace,* 258 U. S. 495, held that supervision of commission men under the Act was authorized by the Commerce Clause. The Court referred

to exorbitant or unreasonable stockyard charges as an undue burden on commerce. In *Chicago Board of Trade* v. *Olsen,* 262 U. S. 1, 34, the Court said that *Stafford* v. *Wallace* presented the question whether the Secretary of Agriculture could prevent the abuse of exorbitant charges by commission men.

The commission business of appellants is affected with a public interest because of its vital importance to interstate commerce and its monopolistic character.

Prescription of appellants' maximum commission charges is not wage-fixing, and the power to regulate rates is not destroyed because the capital employed is small, wages and salaries are the principal cost item, or much of the service is performed by owners.

III. The Packers and Stockyards Act parallels the Interstate Commerce Act. It has been held under the latter that the Court will not substitute its judgment for that of the Commission in the determination of reasonable rates, but that it will consider whether the decision of the Commission can be supported by the evidence or whether it is confiscatory. In this case the evidence in support of the Secretary's determination includes a detailed financial audit of each firm affected and extensive evidence covering the history and practical operation of the commission business. Substantial evidence supports his subsidiary findings as to reasonable operating cost.

It is well settled that the Court will not enjoin rates attacked as confiscatory before they have been put into operation unless a case for relief is clearly proved. *Aetna Insurance Company* v. *Hyde,* 275 U. S. 440, held that evidence of the effect of rates upon the aggregate business of an entire industry does not establish confiscation unless supplemented by proof that each concern affected was efficiently operated. In this case there is no convincing proof of reasonably efficient operation by any of appellants. In addition, the exhibits purporting to show the

confiscatory effect of operation under the Secretary's rate schedule are incomplete, speculative, and misleading.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

The Packers and Stockyards Act, August 15, 1921, c. 64, §§ 301-316, 42 Stat. 159, 163-168; U. S. C., Tit. 7, §§ 201-217, declares that persons engaged in the business of buying or selling in interstate commerce livestock at a stockyard on a commission basis are "market agencies"; requires such agencies to furnish their services upon reasonable request, without discrimination and at reasonable rates; and confers upon the Secretary of Agriculture the power to determine what are the just and reasonable rates or charges for their services. The Secretary prescribed a tariff of maximum charges for such services at the Omaha Stockyards, effective January 1, 1927. This suit was brought in the federal court for Nebraska, under § 316, to enjoin the enforcement of that order and to set it aside. Fifty-eight concerns, all registered under the Act as such market agencies, and together comprising the entire membership of the Omaha Livestock Exchange, joined as plaintiffs. The United States, the Secretary of Agriculture, the Attorney General and the United States Attorney for Nebraska were made defendants. The prayers were that the order be declared null and void and that the defendants be enjoined from enforcing it by canceling the registration of the agencies, or by instituting proceedings to enforce the penalties prescribed by the Act for violation of an order, or by other means. There were also prayers for a restraining order and for an interlocutory injunction. Compare *Stafford* v. *Wallace*, 258 U. S. 495.

The occasion for the Secretary's order was this. There is no competition among the Omaha market agencies as to rates, since the Exchange rules require all members to

make the same charges for their services. As required by § 306 of the Packers and Stockyards Act, the Omaha market agencies had filed with the Packers and Stockyards Administration at Washington a schedule of charges known as Omaha Livestock Exchange Tariff No. 1. On January 16, 1926, they filed a new schedule, known as Tariff No. 2, which introduced higher rates to become effective January 26, 1926. The Secretary of Agriculture, acting on his own motion, issued, on January 25, an order suspending the operation of the proposed schedule; and gave to the market agencies and others concerned notice of public hearings to be held before an examiner of the Packers and Stockyards Administration, under Title III of the Act, to inquire into the reasonableness of the new schedule.[1]

The hearings before the Examiner extended over many months. The market agencies participated through counsel, but introduced little evidence. The Government introduced much. The evidence before the Secretary occupies, in condensed form, 532 pages of the printed record. It consists of the testimony of 33 witnesses and 102 exhibits, including 59 special audits of the books of the several plaintiffs. Upon that record and the report of the Examiner, the case was argued orally by counsel before the Secretary. He made a report which occupies 20 pages of the printed record. His order was based on the findings therein contained.

The application for an interlocutory injunction was made before three judges, pursuant to the provisions of the Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 208, 219–20, U. S. C., Tit. 28, § 47, which, by § 316 of the Packers and Stockyards Act, are made applicable to proceedings brought to restrain or annul orders of the

[1] As the Secretary's power to suspend a tariff pending a hearing is limited by § 306 to a period of sixty days, Tariff No. 2 became operative on March 27, 1926.

Secretary. *Stafford* v. *Wallace,* 258 U. S. 495, 512. At that hearing, the Government consented that the interlocutory injunction should issue. Upon the filing of the answer, a special master was appointed by the three judges to hear the evidence and report his conclusions to the court. The master admitted, in addition to the record before the secretary, oral evidence which, in condensed form, occupies 84 pages of the printed record, and 24 elaborate exhibits. Relying in part on this new evidence, he recommended that the injunction be made permanent. The case was then heard by the three judges on final hearing, upon exceptions to the master's report and a motion to confirm. That court also held the additional evidence admissible. After considering it in connection with that which had been introduced before the Secretary, the court found for the defendants and entered a final decree dissolving the interlocutory injunction and dismissing the bill. 29 F. (2d) 750. The District Judge allowed an appeal to this Court under § 238 (4) of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936, 938, U. S. C., Tit. 28, § 345 (4).[2]

The plaintiffs conceded below that, being engaged in interstate commerce at public stockyards, they are subject to some regulation by Congress. But they claimed that the order is void, in whole or in part, on five grounds. That the Act does not purport to confer upon the Secretary power to issue an order prescribing commission charges for market agencies and directing their observance in the future. That, if the Act be construed as confer-

[2] In doing so, he also approved an appeal bond to operate as a supersedeas and granted a temporary injunction pending the appeal. This part of the order, being beyond the power of a single judge, was later vacated by him. *Cumberland Telephone & Telegraph Co.* v. *Louisiana Public Service Commission,* 260 U. S. 212. An application for a stay made to the three judges was denied on February 11, 1929. It was not until then that the rates which had been prescribed by the Secretary on November 19, 1926, became operative.

ring such authority, it exceeds the constitutional power of the Federal Government, because it is not a regulation of commerce, and violates the Fifth Amendment, because the charges to be fixed are those for personal services. That so much of the order as reduces the charges below those of Tariff No. 1 is void, because it was outside the scope of the Secretary's inquiry as defined in the notice given by him. That the evidence presented to the Secretary was not sufficient to establish that the charges contained in either Tariff No. 1 or Tariff No. 2 were unreasonable or discriminatory; or that the schedule prescribed by the Secretary would adequately compensate the market agencies for their services and disbursements. That the rates in force prior to the hearing were not excessive, unreasonable or discriminatory; and that the charges prescribed by the Secretary are unreasonable and confiscatory.

In this Court twenty-seven specific errors are assigned, although some were not pressed in argument. One assignment attacks the construction given to the Act. One attacks its constitutionality insofar as it purports to authorize the Secretary to fix plaintiffs' commission charges. Fifteen assignments attack the findings of the Secretary on the grounds that the evidence before him was not sufficient to sustain them, or that he erred in making specific findings, or that he erred in ruling on the admissibility of evidence and on the effect given to evidence, or that he erred in his processes of reasoning. Seven relate to the lower court's treatment of the additional evidence introduced before the master. One assignment attacks the legality of the order, insofar as it reduces the charges below those of Tariff No. 1, on the ground that it was beyond the scope of the inquiry. One attacks the order on the ground that it is confessedly confiscatory as to some of the plaintiffs and cannot be sustained except by fixing the number of plaintiffs entitled to carry on the

business, or by eliminating some plaintiffs for the purpose of increasing the compensation of those remaining. And one assignment attacks the order on the ground that it is confiscatory as to all the plaintiffs.

First. The contention that Congress did not purport to empower the Secretary to issue an order prescribing the charges of market agencies is without substance. The language used was apt to confer the power. The Committee of the House declared in terms that it did so, when it reported the bill.[3] The executive department charged with the duty of enforcing the Act so interpreted it. This Court assumed in *Stafford* v. *Wallace,* 258 U. S. 495, 514, and *Chicago Board of Trade* v. *Olsen,* 262 U. S. 1, 34, that the power had been conferred. The *Maximum Rate Cases,* 162 U. S. 184, 167 U. S. 479, 168 U. S. 144, upon which appellants rely, lend no support to their contention.

The order here in question resulted from a proceeding begun under Title III, § 306. Subdivision (a) of that section requires the agencies to file with the Secretary their schedules of rates. Subdivision (e) authorizes the Secretary, upon complaint or on his own motion, to suspend a new rate pending a hearing as to its lawfulness; and, after the hearing, to make such order with reference thereto as would be proper in a proceeding initiated after the rate had become effective. Subdivision (g) makes any agency which fails to comply with any order made under this section liable to a penalty recoverable in a

[3] Report No. 77, 67th Congress, First Session, on H. R. 6320, states at p. 10, referring to Title III: ". . . the Secretary of Agriculture is given substantially the same jurisdiction over stockyard matters which the Interstate Commerce Commission has over railroads, including the power, after full hearing, to establish and enforce just and reasonable rates and charges for, and practices in connection with, the furnishing of stockyard services." By the definitions contained in § 301 (b) and (c), the term "stockyard services" includes the services rendered by the plaintiffs.

civil action; and subdivision (h) provides for a fine and imprisonment in cases of wilful violation.

Section 310 of the same Title provides that whenever, after a full hearing, the Secretary is of opinion that any rate "of a stockyard owner or market agency" is unreasonable, he may (a) fix the charge to be thereafter observed and (b) make an order that "such owner or operator" shall not thereafter "collect any rate or charge for the furnishing of stockyard services other than the rate or charge so prescribed." Plaintiffs urge that subdivision (a) confers only the power to declare what rates shall be reasonable, and that this declaration is effective only for purposes of reparation, as *prima facie* proof of such claims; that the power to compel observance of such rates in the future by enforcement of the penalties provided in § 314 is granted solely in subdivision (b); that this subdivision applies only to owners or operators of stockyards—not to all market agencies; and that, therefore, they are entitled to an injunction against the enforcement of the penalties, even though such injunction would not finally dispose of this litigation.

The argument is highly strained. There is nothing in § 310, or elsewhere in the Act, evidencing a purpose to exclude market agencies from subdivision (b), and to restrict the power of regulation to but a part of the "stockyard services." The term "operator" in § 310 (b) is an apt designation of one who conducts a market agency at a stockyard. An operator of a stockyard is covered by the word "owner" under the express definition in § 201 (a).

Second. The contention that the Act, if construed as authorizing the order assailed, is void under the due process clause, is likewise unsound. It rests upon the fact that the services for which the Secretary's order fixes the charges are practically the personal services of brokers,

Some of the market agencies are corporations; some partnerships; some are individually owned. The capital needed in the conduct of their business is small. It is said that the business is wholly one of skill and labor, and that the commission man's only implements of trade are a horse on which he rides in the stockyards and a desk on which he keeps his accounts. The Union Stockyards are owned by a separate corporation in which the plaintiffs have no interest and which has no interest in the commissions charged by them. But each agency occupies a certain space in the yards and Exchange building, for which an annual or monthly rental is paid. When a producer wishes to sell his live stock on the Exchange, he ships it by rail or motor truck, or drives it on foot, to an agency at the stockyards. After the stock is unloaded, it is driven by the agency to its pens, sorted, watered, fed and offered by it for sale. The feed is provided by the stockyards corporation on order of the agency and a separate charge is made therefor by the corporation. When a purchaser is found, the stock is driven to the yard scales and weighed. Responsibility passes to the purchaser, or to the agency acting for him, as the stock is taken off the scales. Shipments are generally sold on the day of delivery and payments are made on the same day or the next morning. The agency remits the proceeds to the shippers at once, after deducting its commissions, freight, yardage, feed, inspection and other charges.

The argument is that to prescribe a common maximum of earning power for commission men, who differ between themselves in the length of their experience, their relative aptitude for the work and their individual industry, is to penalize the skillful for the benefit of the unskillful; that in legislative price-fixing there are vital distinctions, from the constitutional standpoint, between property and the use of property, on the one hand, and personal serv-

ices, on the other; that property originates with the State and reverts to the State, whereas, liberty—freedom to contract as to personal services—is a pre-requisite to the very organization of a government of the people; that it is impossible to ascertain what is a fair return for personal services because liberty, unlike property, has no actual or theoretical equivalent in money; that while property may be taken for a public use upon payment of just compensation, liberty—personal services—may not be so taken except in time of war or as a punishment for crime; that, since personal services can not be taken for a public use, they cannot be said to be dedicated to a public use or devoted to a public service; that this rate-fixing is in essence wage-fixing, since the stockyard services performed by the plaintiffs involve only skill and labor, and that wage-fixing was held to be beyond the power of Congress, *Adkins* v. *Children's Hospital,* 261 U. S. 525; that, even if not obnoxious as an attempt at wage-fixing, the limitation of charges for personal service is precluded by *Tyson & Bro.* v. *Benton,* 273 U. S. 418 and *Ribnik* v. *McBride,* 277 U. S. 350.

It is true that performance of the specific work done by the plaintiffs does not require them to invest extensive capital. But it is essential that they employ the valuable property of the stockyards corporation, for which a charge is ultimately made to the shipper or buyer. The mere division of the stockyard services between the stockyards corporation and the market agencies does not deprive Congress of a power of regulation which it otherwise would have had. But the constitutionality of the power conferred does not rest upon so narrow a ground. There is nothing in the nature of monopolistic personal services which makes it impossible to fix reasonable charges to be made therefor; and there is nothing in the Constitution which limits the Government's power of regulation to businesses which employ substantial capital. This

Court did not hold in *Tyson & Bro.* v. *Banton* and *Ribnik* v. *McBride* that charges for personal services cannot be regulated. The question upon which this Court divided in those cases was whether the services there sought to be regulated were then affected with a public interest. Whether a business is of that class depends, not upon the amount of capital it employs, but upon the character of the service which those who are conducting it engage to render.

Plaintiffs perform an indispensable service in the interstate commerce in live stock. They enjoy a substantial monopoly at the Omaha Stock Yards. They had eliminated rate competition and had substituted therefor rates fixed by agreement among themselves, without consulting the shippers and others who pay the rates. They had bound themselves to maintain uniform charges regardless of the differences in experience, skill and industry. The purpose of the regulation attacked is to prevent their service from thus becoming an undue burden upon, and obstruction of, that commerce. *Stafford* v. *Wallace*, 258 U. S. 495, 515, 516; *Chicago Board of Trade* v. *Olsen*, 262 U. S. 1, 34. There is here no attempt to fix anyone's wages or to limit anyone's net income. Differences in skill, industry and experience will continue to be factors in the earning power of the several plaintiffs. For, the order fixes only the charges to be made in individual transactions.

Third. The claim that the order is void for lack of proper notice, insofar as it reduces charges below Tariff No. 1, is unsupported. The contention is that the notice of the hearings before the Examiner and the Secretary did not apprise plaintiffs of the Secretary's intention to fix a new schedule, but led them to believe that the hearings would be confined to the inquiry whether Tariff No. 2 was excessive and that, if it was found to be so, Tariff No. 1 would be left in force; whereas the tariff prescribed

by the Secretary carries rates lower than Tariff No. 1. The notice given by the Secretary was neither defective nor misleading. It informed the plaintiffs that a hearing would be had under Title III of the Act. It apprised them that they would have "the right to appear and show cause why a further order in respect to the said schedule of rates and charges should not be made" pursuant to Title III. Section 306 (e) of that title provides that upon such a hearing the Secretary may make any order with reference to the proposed schedule which he could make in a proceeding initiated after the schedule had become effective. And § 310 of the same title expressly empowers the Secretary in any such proceeding, to fix the just and reasonable rate to be charged in the future, without limiting him to a determination of the lawfulness of a proposed rate. The plaintiffs should have anticipated, therefore, that the Secretary would fix a new rate, if the evidence before him would lead him to believe that such a course was proper and desirable.

Fourth. The claim that the order is void because unsustained by the evidence before the Secretary, or because of specific errors in rulings or findings, lacks merit. The Secretary found that monopolistic power was exercised by the plaintiffs without the usually attendant economy of minimizing expenditures for business getting; that the operating costs of the several agencies for the performance of similar services varied widely; that some of the expenses were wasteful and unnecessary; that the profit yielded by Tariff No. 2, on the basis of the estimated reasonable cost of conducting the business, allowing for reasonable salary expenses, advertising costs, overhead, Exchange assessments and dues and interest at the rate of 7 per cent. on the invested capital, was unreasonable; that the Tariff was unduly complicated and confusing, not only to shippers but even to experienced employees of the agencies; that, because of the presence of maximum

and minimum charges, and because of differences in rates based on the mode of delivery of the stock, its effect on different shippers was unjust, inequitable and not based on any reasonable differences in the cost or value of the service performed; that it unjustly favored traders and speculators by prescribing half the regular commission charges for buying and selling for their account; that, for these reasons, the operation of Tariff No. 2 should be suspended and there should be substituted the schedule drawn by the Secretary which prescribed generally lower charges, eliminated the several unjust discriminations and yielded a reasonable return to the plaintiffs above the legitimate cost of their service.

It is urged that there was not sufficient evidence before the Secretary to establish that the charges contained in either Tariff No. 1 or Tariff No. 2 were discriminatory or unreasonable, or that the schedule prescribed by the Secretary would adequately compensate the market agencies for their services and disbursements; that the Secretary confined the fixing of rates to Omaha, although relatively higher rates prevail under substantially similar circumstances in other markets and it was possible to fix rates for all competing markets; that his order is based upon the notion that the industry is suffering from an oversupply of market agencies and that some of the plaintiffs should be eliminated therefrom; that it is based upon irrelevant considerations of the economic condition of plaintiffs' patrons; that it resulted from a complete misunderstanding of the plaintiff's function and a disregard of the really controlling facts of the industry; that the prescribed rates are based upon an assumed cost of the service which disallowed expenses actually incurred and omitted basic cost items such as some additional depreciation, bad debts, supervision, going concern value and additional items of invested capital; and that the revenues estimated to result from the recommended increase of the charges to traders

and speculators will not be realized, because the increase will drive the traders and speculators from the market.

We find in the evidence before the Secretary ample support for the findings and the conclusion reached by him. It may be that some of the evidence was irrelevant or of little weight, and that some of the reasoning was not persuasive. But mere admission by an administrative tribunal of matters which, under the rules of evidence applicable to judicial proceedings, would be deemed incompetent, or mere error in reasoning upon evidence adduced, does not invalidate an order made by it. *United States* v. *Abilene & Southern Ry.*, 265 U. S. 274, 288; *Northern Pacific Ry. Co.* v. *Department of Public Works*, 268 U. S. 39, 44. It has been settled in cases arising under the Interstate Commerce Act that if an order rests upon an erroneous rule of law, *Interstate Commerce Commission* v. *Diffenbaugh*, 222 U. S. 42; or is based upon a finding made without evidence, *Chicago Junction Case*, 264 U. S. 258, 263; or upon evidence which clearly does not support it, *Interstate Commerce Commission* v. *Union Pacific R. R. Co.*, 222 U. S. 541, 547; *New England Divisions Case*, 261 U. S. 184, 203; *Colorado* v. *United States*, 271 U. S. 153, 166, the order must be set aside. These rules are applicable also to suits arising under the Packers and Stockyards Act. But the order here assailed is not subject to any of these infirmities.

Fifth. With regard to the assignments of error based on the additional evidence introduced below, a question of practice requires consideration. After the defendants filed their answer, the plaintiffs moved for the appointment of a special master. The only grounds set forth in the motion were these; that the character and volume of the evidence before the Secretary were such that it would require for its due consideration long study and the aid of expert accountants; that it was necessary to take additional testimony from a large number of shippers to the

Omaha market to show that the charges under Tariff No. 2 were satisfactory to shippers and that the charges prescribed by the Secretary would result in injury to the live stock business, by deteriorating the quality of the service; that it was necessary to introduce additional testimony and additional audits to show the effect of the rates prescribed by the Secretary on the business of the year 1926 and their continuing effect on the business of 1927; and that it was necessary to take additional testimony from a large number of the plaintiffs to show that under the application of the rates prescribed by the Secretary, they will be unable to continue in business.

The court granted the motion to appoint the master and authorized him "to rule upon the admission and exclusion of evidence, subject to the court's review of the same." In its opinion on final decree, the court justified the admission of the evidence, and considered the same, on the ground that the notice of the hearings before the Examiner did not advise plaintiffs that the Secretary intended to fix a new schedule of rates. As we have shown above, the court erred in holding that the notice given was inadequate. But if there had been a failure to give due notice, it would have been ground only for setting aside the order without inquiry into its merits, as having been made without notice and hearing. Such failure does not justify trying in the court, upon new evidence, the issues set forth in the motion to appoint the master.

A proceeding under § 316 of the Packers and Stockyards Act is a judicial review, not a trial *de novo*. The validity of an order of the Secretary, like that of an order of the Interstate Commerce Commission, must be determined upon the record of the proceedings before him,—save as there may be an exception of issues presenting claims of constitutional right, a matter which need not be considered or decided now. *Louisville & Nashville R. R. Co.* v. *United States*, 245 U. S. 463, 466; compare

Liscio v. *Campbell*, 34 F. (2d) 646, 647; and see *Prendergast* v. *New York Telephone Co.*, 262 U. S. 43, 50 and *Ohio Valley Water Co.* v. *Ben Avon Borough*, 253 U. S. 287, 289. On all other issues his findings must be accepted by the court as conclusive, if the evidence before him was legally sufficient to sustain them and there was no irregularity in the proceeding.[4] To allow his findings to be attacked or supported in court by new evidence would substitute the court for the administrative tribunal as the rate making body. Where it is believed that the Secretary erred in his findings because important evidence

[4] The judicial review of rate orders in suits begun under the Urgent Deficiencies Act to set aside orders of the Interstate Commerce Commission does not differ in substance from that in suits instituted by the Commission under the Interstate Commerce Act to enforce its orders. The Act to Regulate Commerce, February 4, 1887, c. 104, § 16, 24 Stat. 379, 384–5, specifically provided that, in proceedings to enforce orders of the Commission, its findings were to be merely *prima facie* evidence; and the Court was not to be restricted to the record before the Commission. *Cincinnati, New Orleans & Texas Pacific Ry. Co.* v. *Interstate Commerce Commission*, 162 U. S. 184, 187, 195–6; *Interstate Commerce Commission* v. *Alabama Midland Ry. Co.*, 168 U. S. 144, 174–5. Compare *United States* v. *Los Angeles & Salt Lake R. Co.*, 273 U. S. 299, 309. The Commerce Court Act, June 18, 1910, c. 309, § 13, 36 Stat. 539, 554–5, amended § 16 and restricted the scope of review as follows: "If, after hearing, that court determines that the order was regularly made and duly served, and that the carrier is in disobedience of the same, the court shall enforce obedience . . ." This is the provision now in force,—U. S. C., Tit. 49, § 16 (12). Reparation orders are still only *prima facie* evidence. U. S. C., Tit. 49, § 16 (2).

Compare *Oregon R. R. & Navigation Co.* v. *Fairchild*, 224 U. S. 510, 525; *Napa Valley Electric Co.* v. *Cal. R. R. Comm.*, 251 U. S. 366, 370; and *Pacific Tel. & Tel. Co.* v. *Kuykendall*, 265 U. S. 196, 200. Also the District of Columbia Public Utilities Law, Act of March 4, 1913, c. 150, § 8, par. 67, 37 Stat. 938, 989; the Valuation Act, March 1, 1913, c. 92, 37 Stat. 701, 703, U. S. C., Tit. 49, § 19a, (b) Fifth (j); and the Federal Trade Commission Act, Sept. 26, 1914, c. 311, § 5, 38 Stat. 717, 719–20, U. S. C., Tit. 15, § 45.

was not brought to his attention, the appropriate remedy is to apply for a rehearing before him or to institute new proceedings. He has the power and the duty to modify his order, if new evidence warrants the change. Compare *Interstate Commerce Commission* v. *Union Pacific R. R. Co.*, 222 U. S. 541, 550. A rate order is not *res judicata*. Every rate order made may be superseded by another.

Sixth. There is also a contention that the rates prescribed are not merely unsupported by the evidence, but are confiscatory; and that the order is therefore void. Whether the additional evidence before the master was admissible on the issue of confiscation presents a serious question of practice which was not argued by counsel. The lower court held the additional evidence admissible, and, after considering it, reached the conclusion that the charges prescribed are not unreasonably low or confiscatory. This conclusion of the lower court conforms, in our opinion, to the evidence, whether the examination be confined to that evidence which was received by the Secretary or be extended to include the additional evidence introduced before the master and the court. The question of the admissibility of the additional evidence on the issue of confiscation may, therefore, be passed, and it is passed, without decision.

Affirmed.

LUCAS, COMMISSIONER OF INTERNAL REVENUE, *v.* AMERICAN CODE COMPANY, INC.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 67. Argued January 8, 1930.—Decided February 24, 1930.

A corporation, which kept its accounts, and made its income tax returns, on the accrual basis, sought to deduct, under § 234 (a) of the Revenue Act of 1918, as a loss sustained in 1919, the amount

of a judgment which it suffered in 1922 and paid in 1923. The judgment was founded on a breach of contract committed by the taxpayer in 1919, in discharging a sales manager who, by the terms of the contract, was to be employed for eighteen years more and be compensated by commissions on sales. Though denying and contesting its liability, the taxpayer had set up on its books in 1919 a reserve equal to the commissions for that year, and had increased it in 1920, on the same basis; and after the rendition of the judgment, it had adjusted the reserve to the amount of the recovery. *Held:*

1. Since the general requirement of the statute that losses be deducted in the years in which they are sustained calls for a practical, and not a legal, test, and since the direction, § 212 (b), that net income be computed according to the method of accounting regularly employed by the taxpayer is expressly limited to cases where the Commissioner believes that the accounts clearly reflect the net income, the administrative interpretation and practice in these regards should not be disturbed by the courts unless clearly unlawful. P. 449.

2. Since it could not be said that the loss actually paid by the taxpayer in 1923 was, as a matter of law or undeniable fact, sustained in the year 1919, and since the taxpayer did not in that year accrue an estimated amount of the loss on its books, rejection of the deduction for that year should be sustained. Pp. 450–452.

3. Mere reserves to cover contingent liabilities are not allowable as deductions. P. 452.

30 F. (2d) 222, reversed.

CERTIORARI, 279 U. S. 832, to review a judgment of the Circuit Court of Appeals, reversing a decision of the Board of Tax Appeals, 10 B. T. A. 476, which sustained the Commissioner in rejecting a claim for a refund and in asserting a deficiency.

Solicitor General Hughes, with whom *Attorney General Mitchell, Assistant Attorney General Willebrandt, Messrs. Alfred A. Wheat, Sewall Key* and *John Vaughan Groner,* Special Assistants to the Attorney General, *C. M. Charest,* General Counsel, and *P. S. Crewe,* Special At-

torney, Bureau of Internal Revenue, were on the briefs, for petitioner.

Mr. Clark H. Hebner for the respondent.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

When the income-tax return for 1919, of the American Code Company, Inc., was being audited in 1925, the Company filed with the Commissioner of Internal Revenue a claim for a refund based upon its failure to deduct from its 1919 gross income the amount for which judgment was recovered against it in 1922, on a contested liability for a breach of contract in 1919. The Commissioner of Internal Revenue rejected the claim and asserted a deficiency. His ruling was sustained by the Board of Tax Appeals. 10 B. T. A. 476. Its decision was reversed by the United States Circuit Court of Appeals for the Second Circuit. 30 F. (2d) 222. We granted a writ of certiorari. 279 U. S. 832.

The facts on which the claim for the refund is based are as follows: The Company agreed to employ Farquhar as sales manager for eighteen years from January 3, 1919, the compensation to be a commission based on sales. In May, 1919, it discharged him, for alleged cause. In July, 1919, Farquhar brought suit against it in the Supreme Court of New York for wrongful discharge, claiming $100,000 damages. Affirmative defenses were interposed and liability was contested. In October, 1919, the Company notified the Commissioner of the suit and asked leave to deduct in its income-tax return an amount equal to the commissions for 1919 computed on the contract basis. Permission was refused; but the Company set up on its books, at the close of the year, a reserve equal to

the amount of such commissions, $14,764.79. At the close of 1920, the amount in this reserve was increased by $32,994.09, computed on the same basis. In 1922, after a jury trial, judgment for $21,019.19 was entered in the trial court and, on appeal by the Company, was affirmed by the Appellate Division. The Company then prosecuted a further appeal to the Court of Appeals. In 1923 the judgment was affirmed by that court and paid by the Company. The judgment having been rendered by the trial court early in 1922 before the books were closed for 1921, the reserve set up was adjusted as of the close of 1921, to the amount of the recovery, $21,019.19. That sum is claimed as the deduction for 1919.

The Company kept its books and made its income-tax returns on the accrual basis. The Revenue Act of 1918, Act of February 24, 1919, c. 18, § 234 (a) (4), 40 Stat. 1057 1077–8, provides that in computing net income "losses sustained during the taxable year and not compensated for by insurance or otherwise" shall be allowed as deductions. Section 212 (b) provides that the net income shall be computed "in accordance with the method of accounting regularly employed in keeping the books of such taxpayer," unless the method employed does not clearly reflect the net income. And Article 111 of Regulations No. 45, (1920 ed.), of the Bureau of Internal Revenue provides that a "person making returns on an accrual basis has the right to deduct all authorized allowances, whether paid in cash or set up as a liability. . . ."

The Company's argument, sustained by the Court of Appeals, is that, since the breach of the contract occurred in 1919, all the facts which gave rise to the liability were fixed in that year; that damages must be assessed as of the date of the breach; that the loss therefore occurred in that year; and that it is immaterial that the amount of the damages was not determined or paid until later.

Attention is specifically called to the provision in Article 111, which declares that if after making a return "a taxpayer first ascertains the amount of a loss sustained during a prior taxable year which has not been deducted from gross income, he may render an amended return for such preceding taxable year, including such amount of loss in the deductions from gross income, and may file a claim for refund of the excess tax paid by reason of the failure to deduct such loss in the original return."

Generally speaking, the income-tax law is concerned only with realized losses, as with realized gains. *Weiss* v. *Wiener,* 279 U. S. 333, 335. Exception is made however, in the case of losses which are so reasonably certain in fact and ascertainable in amount as to justify their deduction, in certain circumstances, before they are absolutely realized. As respects losses occasioned by the taxpayer's breach of contract, no definite legal test is provided by the statute for the determination of the year in which the loss is to be deducted. The general requirement that losses be deducted in the year in which they are sustained calls for a practical, not a legal test. And the direction that net income be computed according to the method of accounting regularly employed by the taxpayer is expressly limited to cases where the Commissioner believes that the accounts clearly reflect the net income. Much latitude for discretion is thus given to the administrative board charged with the duty of enforcing the Act. Its interpretation of the statute and the practice adopted by it should not be interfered with unless clearly unlawful.

Article 111 of Regulations No. 45, interpreting the provisions as to deductions for losses, states: "Any amount paid pursuant to a judgment or otherwise on account of damages for personal injuries, patent infringement or otherwise, is deductible from gross income when the claim is put in judgment or paid. . . ." The

Board of Tax Appeals has held, in a series of well-reasoned opinions, that a loss occasioned by the taxpayer's breach of contract is not deductible in the year of the breach, except under the special circumstances where, within the tax year, there is a definite admission of liabilty, negotiations for settlement are begun, and a reasonable estimate of the amount of the loss is accrued on the books.[1]

It may be assumed that, since the Company kept its books on the accrual basis, the mere fact that the exact amount of the liability had not been definitely fixed in 1919 would not prevent the deduction, as a loss of that year, of the amount later paid. But here there are other obstacles. Obviously, the mere refusal to perform a contract does not justify the deduction, as a loss, of the anticipated damages. For, even an unquestionable breach does not result in loss if the injured party forgives or refrains from prosecuting his claim. And, when liability is contested, the institution of a suit does not, of itself, create certainty of loss. In the few cases in which the

[1] Appeal of Producers Fuel Co., 1 B. T. A. 202; Appeal of Brighton Mills, 1 B. T. A. 392; Appeal of New Process Cork Co., 3 B. T. A. 1339; Appeal of Bump Confectionery Co., 4 B. T. A. 50; Appeal of Hamler Coal Co., 4 B. T. A. 947; Empire Printing & Box Co. *v.* Commissioner, 5 B. T. A. 203; Appeal of Nice Ball Bearing Co., 5 B. T. A. 484, 495; Raleigh Smokeless Fuel Co. *v.* Commissioner, 6 B. T. A. 381; Farmers National Bank *v.* Commissioner, 6 B. T. A. 1036; Jewell *v.* Commissioner, 6 B. T. A. 1040; Lynchburg Colliery Co. *v.* Commissioner, 7 B. T. A. 282; Hidalgo Steel Co. *v.* Commissioner, 8 B. T. A. 76; Fraser Brick Co. *v.* Commissioner, 10 B. T. A. 1252, 1258; Safe Guard Check Writer Corporation *v.* Commissioner, 10 B. T. A. 1262; Ledbetter Manufacturing Co. *v.* Commissioner, 12 B. T. A. 145; J. G. Curtis Leather Co. *v.* Commissioner, 13 B. T. A. 1259, 1265. Compare Appeal of Lane Construction Co., 4 B. T. A. 1133; Celluloid Co. *v.* Commissioner, 9 B. T. A. 989, 1005; Graham-Bumgarner Co. *v.* Commissioner, 11 B. T. A. 603, 605; Lehigh & Hudson River Ry. Co. *v.* Commissioner, 13 B. T. A. 1154, 1164.

Board of Tax Appeals has allowed a deduction in the year of the breach, the contracts, involving the purchase and sale of goods, were performable in a comparatively short period; the approximate amount of the damages was reasonably predictable; negotiations for settlement had been commenced within the year and were completed soon after its close; and the taxpayers had accrued on their books, at the end of the year, a liability reasonably estimated to equal the amount of the damages.[2]

In the case at bar, the contract had nearly eighteen more years to run, at the time of his breach. Liability for the breach was denied and strenuously contested, the litigation being carried to the highest court of the State. The amount of the damages, if any, was wholly unpredictable. While the facts determining liability had occurred in the year of the breach, the amount to be recovered, if there was legal liability, depended in large part on the course of future events. Farquhar was under a duty to mitigate damages. He might have procured new employment which would have reduced his recovery to a nominal amount. Or, recovery might have been reduced or defeated by his death. Finally, the Company did not accrue on its books, within the tax year, a liability in the estimated amount of the loss. The reserve set up had no relation to the apprehended total loss. It constituted simply the amount of the commissions which would have

[2] Thus, in Appeal of Producers Fuel Co., note 1 *supra*, there were two contracts for the purchase, respectively, of 15,700 and 20,000 tons of coal in equal monthly instalments between May 1920 and March 1921 and between May 1920 and May 1921. Both contracts were broken in December 1920 and offers of settlement were immediately made. Reserves of $7,500 and $30,000 were set up in 1920. The claims were settled in January 1921 for $5,500 and $29,792.40. Similar situations were involved in Raleigh Smokeless Fuel Co. *v.* Commissioner and Fraser Brick Co. *v.* Commissioner, *ibid.*

been payable in that year if Farquhar had remained in the Company's employ. That the Company did not intend the reserve to be an accrual of the total estimated loss is clearly indicated by the fact that, in 1920, it charged to the reserve, to cover the commissions which would have been payable in 1920, an additional amount, more than double that charged in 1919.

The prudent business man often sets up reserves to cover contingent liabilities. But they are not allowable as deductions.[3] The reserve set up by the Company was of that character. It cannot be said that the loss actually paid by the Company in 1923 was, as a matter of law or of undeniable fact, sustained in 1919. Nor did the Company so regard it. The case at bar is unlike *United States* v. *Anderson,* 269 U. S. 422. There, the liability for the munitions tax at a fixed rate on the business done in 1916 had confessedly accrued in that year and was a charge on the business of that year, although the exact amount due may not have been then ascertainable and the tax was not payable until 1917. It is also unlike *American National Co.* v. *United States,* 274 U. S. 99. There, the bonus contract provided definitely for the payment of a fixed amount. It was *debitum in praesenti, solvendum in futuro.* The case at bar is in principle more like *Lewellyn* v. *Electric Reduction Co.,* 275 U. S. 243.

Reversed.

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[3] Compare Appeal of Uvalde Company, 1 B. T. A. 932; Appeal of M. C. Stockbridge, 2 B. T. A. 327; Appeal of Northwestern Bakers Supply Co., 2 B. T. A. 834; Appeal of Richmond Light & R. R. Co., 4 B. T. A. 91; Alston *v.* Commissioner, 4 B. T. A. 1159; The Davis Co. *v.* Commissioner, 6 B. T. A. 281, 283; Fibre Yarn Co. *v.* Commissioner, 10 B. T. A. 479, 480; Kaufman Department Stores, Inc. *v.* Commissioner, 11 B. T. A. 949.

FLORSHEIM BROTHERS DRYGOODS COMPANY, LTD., *v.* UNITED STATES.

WHITE, COLLECTOR, *v.* HOOD RUBBER CO.

WRITS OF CERTIORARI TO THE CIRCUIT COURTS OF APPEALS FOR THE FIFTH AND FIRST CIRCUITS RESPECTIVELY.

Nos. 118 and 414. Argued January 13, 14, 1930.—Decided February 24, 1930.

1. Although the Revenue Act of 1918 was not approved until February 24, 1919, § 241(a) required that returns on the basis of the calendar year be made on or before March 15, and § 239 required that a corporation's return should state specifically the items of its gross income and deductions and credits. In order to allow corporations extended time to prepare their returns under § 239, and in order to avoid the postponement of initial payments of tax that would have resulted, under § 250(a), if extensions were granted unconditionally, the Commissioner of Internal Revenue devised a plan whereby extensions of time to file the return required by the Act were granted to corporations only on condition that, on or before March 15, they send to the Collector one-fourth of their estimated tax with an instrument executed under oath, containing only a statement that one-fourth of the estimated tax was remitted therewith and that, for reasons set forth, an extension of time to file the "complete return" was requested. The form provided by the Commissioner for this purpose was entitled "Tentative Return of Corporation Income and Profits Taxes and Request for Extension of Time for Filing Return." *Held:*

   That this so-called "tentative return" was not the return within the meaning of §§ 250(d) of the Revenue Act of 1921, limiting the time within which taxes under the Act of 1918 might be determined and assessed to five years after the return was filed, etc., and that the filing of such "tentative return" did not start that period of limitation. P. 456.

2. A waiver executed by the Commissioner and a taxpayer pursuant to § 250(d) of the Revenue Act of 1921, consenting to a determination, assessment and collection of income taxes under the

Act of 1918, and to be in effect for one year after the expiration of the statutory period of limitation, was not a contract preventing Congress from extending the statutory period for the collection of such taxes, by legislation enacted before that period as extended by the waiver has expired. P. 465.

3. Income taxes assessed within the statutory period, as extended by waiver, and after the enactment of the Revenue Act of 1924, the collection of which had not been previously barred, could be collected pursuant to §§ 278(d) of that Act at any time within six years of the assessment. P. 467.

4. Income taxes assessed at any time within the statutory period, as extended by waiver, and the collection of which was not barred on the enactment of the Revenue Act of 1926, could be collected under § 278(d) of that Act within six years of the assessment. *Id.*

29 F. (2d) 895, affirmed; 33 F. (2d) 739, reversed.

CERTIORARI, *post*, pp. 539, 547, to review judgments of Circuit Courts of Appeals in actions to recover amounts assessed and collected as income and excess profits taxes. In No. 118, the action was brought in Louisiana against the United States, and the judgment of the District Court, 26 F. (2d) 505, for the defendant was affirmed by the Circuit Court of Appeals. The other case was an action against the Collector, in Massachusetts. The judgment of the District Court, 28 F. (2d) 54, was for the plaintiff, and was affirmed by the Circuit Court of Appeals.

Mr. James Craig Peacock, with whom *Messrs. Allen Rendall, A. B. Freyer* and *E. H. Randolph* were on the brief, for Florsheim Brothers Drygoods Company, Ltd.

Mr. Harold C. Haskell, with whom *Messrs. Frank S. Bright, Charles C. Gammons* and *H. Stanley Hinrichs* were on the brief, for the Hood Rubber Company.

Mr. Claude R. Branch, Special Assistant to the Attorney General, with whom *Solicitor General Hughes, Assistant Attorney General Youngquist*, and *Messrs. Sewall*

Key and *Barham R. Gary*, Special Assistants to the Attorney General, were on the brief, for the United States and the Collector of Internal Revenue.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

These cases, which were argued together, present the same questions. In each case, the taxpayer seeks to recover with interest an amount assessed and collected, after March 15, 1925, as an additional income and excess-profits tax for 1918 under the Revenue Act of 1918. In each, the claim is that both the assessment and the collection were made after the expiration of the time allowed therefor. In a long line of cases arising out of similar facts, the Board of Tax Appeals has held consistently that neither the assessment nor the collection was made too late.[1] In No. 414 the action was brought in the federal court for Massachusetts against the Collector to recover $39,043.99. The District Court, without passing on the timeliness of the assessment, held that the collection was barred and entered judgment for the plaintiff, 28 F. (2d) 54. The Circuit Court of Appeals for the First Circuit affirmed the judgment on the ground that the assessment was barred, and expressed no opinion on the question decided by the District Court, 33 F. (2d) 739. In No. 118, the action was brought in the federal court for western Louisiana against the United States to recover $11,282.15.

[1] Appeal of Dallas Brass & Copper Co., 3 B. T. A. 856, 863; Appeal of Boston Hide & Leather Co., 5 B. T. A. 617; Pilliod Lumber Co. *v.* Commissioner, 7 B. T. A. 591, 593; Corona Coal & Coke Co. *v.* Commissioner, 11 B. T. A. 240; Ramsey *v.* Commissioner, 11 B. T. A. 345; Floyd *v.* Commissioner, 11 B. T. A. 903, 905; David Rodefer Oil Co. *v.* Commissioner, 11 B. T. A. 782; L. Loewy & Son, Inc. *v.* Commissioner, 11 B. T. A. 596; Peck, Stow & Wilcox *v.* Commissioner, 12 B. T. A. 569; Lamborn *v.* Commissioner, 13 B. T. A. 177, 189; Kaufman *v.* Commissioner, 14 B. T. A. 602,

That court, deciding both questions in favor of the Government, entered a judgment for the defendant, 26 F. (2d) 505, which was affirmed, on both grounds, by the Circuit Court of Appeals for the Fifth Circuit, 29 F. (2d) 895. In other federal courts, also, there has been diversity of opinion.[2] This Court granted writs of certiorari.

First. Whether the assessment was barred depends upon whether the period of limitation was started by the filing before March 15, 1919, of a so-called "tentative return," or by the later filing of a so-called "completed return." The question arises in this way. The Revenue Act of 1918 was not approved until February 24, 1919; c. 18, 40 Stat. 1057. Section 241 (a) required that returns on the basis of the calendar year should be made on or before the 15th day of March. Section 239 required that a corporation's return should state "specifically the items of its gross income and the deductions and credits allowed." The form of return prescribed by the Commissioner of Internal Revenue for giving this information, known as Form 1120, is an elaborate document composed of a "summary" in four schedules, with eleven supporting schedules and twenty-six sub-schedules. The "summary" calls for the specification of some 93 items. The supporting schedules and sub-schedules call for the specification of some 357 items; and of as many more items to be stated in appendices as the circumstances of the particular taxpayers might require.[3]

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[2] In *Brandon Corporation* v. *Jones*, 33 F. (2d) 969 (D. C. E. D. S. Car.), it was held that both assessment and collection were barred. And see *Rasmussen* v. *Brownfield-Canty Carpet Co.*, 31 F. (2d) 89. In the following cases it was held that collection was not barred; the timeliness of the assessment was not questioned: *Bank of Commerce* v. *Rose*, 26 F. (2d) 365 (D. C. N. D. Ga.); *Loewer Realty Co.* v. *Anderson*, 31 F. (2d) 268 (C. C. A. 2d); *L. Loewy & Son, Inc.* v. *Commissioner*, 31 F. (2d) 652 (C. C. A. 2d).

[3] The form described is known as Form 1120, "Corporation Income and Profits Tax Return For Calendar Year 1918," and is a combined return of income, excess-profits and war-profits under the Revenue

It was obvious that many corporations would be unable, in the short interval between February 24 and March 15, to prepare their returns in time. Sections 227 (a) and 241 (a) authorized the Commissioner to "grant a reasonable extension of time for filing returns whenever in his judgment good cause exists." But § 250 (a) provided that "where an extension of time for filing a return is granted the time for payment of the first installment shall be postponed until the date of the expiration of the period of the extension." The necessities of the Government made it undesirable that payments on account of the first instalment of taxes be postponed. To meet this situation, the following policy was announced in a public statement issued by the Commissioner: "Although no general extension of time will be authorized for filing the Federal Income Tax returns due March 15, the Commissioner of Internal Revenue has approved a novel feature of tax collection which will serve for all practical purposes as a possible extension of forty-five days for the filing of corporation income and excess profits tax returns . . . If a corporation finds that . . . it is impossible to complete its return by March 15, it may make a return of the estimated tax due and make payment thereof not later than March 15. If meritorious reason is shown," the completed return could be filed within forty-five days

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Act of 1918. Statutes imposing direct taxes have always required taxpayers to file "lists" or "schedules" or "statements" or "returns" specifying in detail the information requisite for an assessment of the tax. The word "return" has not always been used. Sometimes it has been used as a synonym for "list," "schedule" or "statement." The specification in the statutes of the prescribed contents of such lists or returns has varied in its detail. But always definite statements of facts were required, from which the tax could be computed. Act of July 9, 1798, c. 70, § 9, 1 Stat. 580, 585-6; Act of July 1, 1862, c. 119, § § 6, 93, 12 Stat. 432, 434, 475; Act of June 30, 1864, c. 173, § § 11, 82, 98, 102, 109, etc., 13 Stat. 223, 225, 258-86; Act of August 5, 1909, c. 6, § 38, 36 Stat. 11, 114; Rev. Stat. § 3174, U. S. C., Tit. 26, § 93.

after that date. The statement continued: "Provision for systematically handling this new feature will be made in the construction of the new return blanks. . . embodied in which is a detachable letter of remittance. Any corporation which finds that, for sufficient reasons, it cannot complete its return by March 15, may detach and fill out the letter of remittance, and forward same to the collector on or before March 15, together with a check . . . for the tax due on that date. . . . A statement in writing of the reasons why it is impossible for the corporation to complete the return by the specified date must accompany every such remittance." [4] The device was modified by a further statement on February 27, 1919. A separate blank, known as Form 1031T and entitled "Tentative Return and Estimate of Corporation Income and Profits Taxes and Request for Extension of Time for Filing Return," was to be used instead of the detachable letter of remittance. This blank was in the form of a letter to the collector and contained, besides instructions and the oath of the president and treasurer, only a statement that one-fourth of the estimated amount of taxes was remitted therewith and that an extension of time to file the complete return was requested for the reasons stated.

Each corporation executed the tentative return, Form 1031T, and sent it, with a remittance of one-quarter of the estimated tax, to the collector on or before March 15, 1919. The Florsheim Company filed its complete return,

[4] This action was taken pursuant to § 1309, which authorized the Commissioner, with the approval of the Secretary, "to make all needful rules and regulations for the enforcement of the provisions of this Act." These public letters from the Commissioner to the Collectors "and others concerned" were issued February 13, 1919; February 27, 1919. See also letters of April 14, 1919, October 3, 1919, and March 17, 1920; and Manual (1920) for the information and guidance of Collectors, §§ 627, 628.

Form 1120, on June 16, 1919; the Hood Company, on July 14, 1919. Section 250 (d) of the Revenue Act of 1918 provided that "the amount of tax due under any return shall be determined and assessed by the Commissioner within five years after the return was due or was made . . ." This period was extended under the Revenue Act of 1921, November 23, 1921, c. 136, § 250 (d), 42 Stat. 227, 265–6, which provided that the amount of the tax under the 1918 Act should be "determined and assessed within five years after the return was filed, unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax." [5] In each of the cases at bar, the Commissioner and the taxpayers executed, prior to March 15, 1924, an instrument called "Income and Profits Tax Waiver." The waivers stated that "In pursuance of the provisions of subdivision (d) of section 250 of the revenue act of 1921," the Commissioner and the taxpayer "consent to a determination, assessment, and collection of the amount of income, excess-profits, or war-profits taxes due under any return made. . . . This waiver is in effect from the date it is signed by the taxpayer and will remain in effect for a period of one year after the expiration of the statutory period of limitations. . ." In each case, the assessment was made more than six years after March 15, 1919, but within six years after the filing of the completed return on Form 1120. If Form 1031T was "the return" within the meaning of the above provisions as to limitation, then the assessments were made too late.

We are of opinion that the filing of the document known as Form 1031T, duly executed, did not start the running

[5] This period of limitation on assessments of taxes under the 1918 Act was continued in the later Revenue Acts. June 2, 1924, c. 234, §§ 277 (a) (2), 278 (c), 43 Stat. 253, 299, 300; February 26, 1926, c. 27, §§ 277 (a) (3), 278 (c), 44 Stat. 9, 58, 59.

of the period of limitation. Form 1031T is not an instrument expressly provided for in the Act. It is not in the nature of a "list," "schedule," or "return," commonly required by tax statutes. It was an invention of the Commissioner designed to meet a peculiar exigency. Its purpose was to secure to the taxpayers a needed extension of time for filing the required return, without defeating the Government's right to prompt payment of the first instalment. As Form 1031T made no reference to income, or to deductions or credits, it could not have been intended as the return "stating specifically the items of . . . gross income, and the deductions and credits"—the return required to satisfy the statute.

Section 3182 of the Revised Statutes, U. S. C. Tit. 26, § 102, provides that the Commissioner shall "make the inquiries, determinations, and assessments of all taxes . . . and shall certify a list of such assessments . . . to the proper collectors." Section 250 (b) of the 1918 Act required that "as soon as practicable after the return is filed, the Commissioner shall examine it. If it then appears that the correct amount of the tax is greater or less than that shown in the return, the installments shall be recomputed." It was to serve these purposes that § 239 required all corporations to make returns "stating specifically the items of . . . gross income and the deductions and credits." The burden of supplying by the return the information on which assessments were to be based was thus imposed upon the taxpayer. And, in providing that the period of limitation should begin on the date when the return was filed, rather than when it was due, the statute plainly manifested a purpose that the period was to commence only when the taxpayer had supplied this information in the prescribed manner. Form 1120 provided for furnishing the data which would enable the Commissioner to make a determination, assessment and recomputation. Form 1031T furnished no data which

could, in any way, aid him in that connection. It is true that even the complete return on Form 1120 need not be accepted by the Commissioner as the sole basis for the determination of the amount of the tax. Assessments are frequently based on audits of the Income Tax Unit. However, the purpose of these audits is not to eliminate the necessity of filing the return, but to safeguard against error or dishonesty.

The corporations concede that § 239 defined the nature of the return required and referred to in the several provisions of the Act, and that Form 1031T did not comply with that section; but, in support of their contention that the tentative return, Form 1031T, started the running of the period of limitation, they present the following arguments. They urge that the sufficiency of a return for the purpose of starting the period of limitations does not depend upon a strict compliance with the requirements of § 239; that the Act required but one return, that Form 1031T was a formal document prescribed by the Commissioner, called a "return" and so termed on its face, and that the complete return should, therefore, be treated as an amendment or completion of the tentative return; that Form 1031T was a sufficient return to start the period of limitation, because it was sufficient to prevent the extension of time for the payment of the first instalment of the tax pursuant to § 250 (a); because it was a sufficient return under § 250 (e) to constitute notice and demand for the payment of the first instalment; because it was a sufficient return to form the basis of an assessment, which, under the law, must be based on a return; and because it was a sufficient return to subject taxpayers to the penalties provided by § 3176 of the Revised Statutes and § 253 of the Act, for failure to file it on time.

These arguments ignore the differences in nature and purpose between Form 1031T and the return required by

the Act. The mere fact that Form 1031T was a formal document prescribed by the Commissioner and termed a "return" does not identify it as the return required by the Act. The word "return" is not a technical word of art. It may be true that the filing of a return which is defective or incomplete under § 239 is sufficient to start the running of the period of limitation; and that the filing of an amended return does not toll the period.[6] But the defective or incomplete return purports to be a specific statement of the items of income, deductions and credits in compliance with § 239. And, to have that effect, it must honestly and reasonably be intended as such. There is not a pretense of such purpose with respect to Form 1031T. Nor is it the purpose of Form 1120 to supply or correct something omitted or misstated in Form 1031T. The latter was neither defective nor incomplete. The extension of time for the payment of the first instalment was prevented, not because Form 1031T was considered a return in compliance with the statute, but because the Commissioner exacted payment as a condition for the requested extension of time to file the return. The penalties were to be imposed for the failure to file, or the late filing, of the detailed return above described. And the penalties were avoided, not by the filing of Form 1031T as a substantial compliance with the requirement of a return, but, as expressly stated in that form, by the extension of time to file which was granted "in consideration of the filing of this tentative return and the payment of not less than one-fourth of the estimated amount of the tax, and for the reasons stated." Obviously, without the payment of the first instalment

[6] See Appeal of National Refining Co., 1 B. T. A. 236; Appeal of Mabel Elevator Co., 2 B. T. A. 517; *United States* v. *National Refining Co.*, 21 F. (2d) 464; *United States* v. *Mabel Elevator Co.*, 17 F. (2d) 109; *Union Pac. R. Co.* v. *Bowers*, 24 F. (2d) 788; *National Tank & Export Co.* v. *United States*, 35 F. (2d) 381.

and the consequent grant of an extension of time, the mere filing of Form 1031T would not have avoided the penalties prescribed for the late filing of the return required by the Act.[7] Nor would the penalties have been avoided by the filing of that form, if the complete return were not filed within the extended time.

The contention that because Form 1031T was sufficient as a notice and demand under § 250 (e) it was a sufficient return to start the period of limitation is equally unsound. That section did not prescribe the exclusive mode for the notice and demand for payment of the first instalment. Any instrument containing the notice and demand would be as efficacious for that purpose as the return required by the statute. Finally, the argument that Form 1031T was a sufficient return to furnish the basis for assessment lacks significance, whether or not it is sound.[8] The Commissioner is not confined to the taxpayer's return for the basis of his assessment. He may secure additional information; and he may assess the tax even if the taxpayer files no return. Rev. Stat. § 3176,

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[7] Attention is called to Article 407 of Internal Revenue Regulations 45, which provided that: "In lack of a prescribed form a statement made by a taxpayer disclosing his gross income and the deductions therefrom may be accepted as a tentative return, and if filed within the prescribed time, a return so made will relieve the taxpayer from liability to penalties, provided that without unnecessary delay such a tentative return is replaced by a return made on the proper form." But obviously Form 1031T was not a tentative return within the meaning of this Article. It did not even purport to be a "statement disclosing gross income and the deductions therefrom."

[8] To sustain the argument that assessment could be made on the basis of Form 1031T, counsel cited only Matteawan *v.* Commissioner, 14 B. T. A. 789 and Lamborn *v.* Commissioner, 13 B. T. A. 177, 187. But it is not clear that in either of these cases, the assessment was in fact made on the basis of that form. In both cases there were other bases; and in both cases the Board of Tax Appeals expressly refused to comment on the propriety of assessment based on Form 1031T. See Appeal of Matteawan Mfg. Co., 4 B. T. A. 953, 956.

U. S. C. Tit. 26, § 97; Revenue Act 1918, § 250 (c). The mere fact that, in the absence of any information, the Commissioner might be compelled to assess the tax on the basis of the taxpayer's estimate, does not transform that simple estimate of the amount of the tax into the detailed return of the items of gross income, deductions, and credits required by the Act. Form 1031T was only a formal substitute for the simple letter originally planned, remitting payment and requesting an extension. That it was called "Tentative Return" is of no significance. It was termed also "Estimate Of Corporation Income And Profits Taxes And Request For Extension Of Time For Filing Return."

It has been said that the Government is assuming an inconsistent and unconscionable attitude. But there is nothing inconsistent or unconscionable in its position. The Commissioner did not represent that the date of filing Form 1031T would be treated as the beginning of the period of limitation. And it is not clear that he had the power to shorten the period prescribed by the statute. The Government has not treated Form 1031T for any purpose as the return required by the Act. The tentative return was confessedly a novel device. It imposed no hardship on taxpayers. Indeed, it enabled them to save the interest charge which otherwise would have attended an extension of time to file the return and pay the first instalment. Notice of the Commissioner's intention to assess deficiencies in stated amounts was given to the corporations much before March 15, 1925. The delay in the assessments past that date was due to negotiations with the Commissioner which resulted in the reduction of those amounts to less than half in the one case and to about one-sixth in the other. The corporations are in no position to complain of the Government's action.

Second. The claim that, even if the assessment was timely, the collection was barred, depends upon the effect

of the "Income and Profits Tax Waiver," and the applicability of the Revenue Acts of 1924 and 1926. As previously stated, both corporations and the Commissioner executed this instrument pursuant to § 250 (d) of the 1921 Act, prior to March 15, 1924, and consented to the determination, assessment and collection of the tax, "this waiver" to be in effect for one year after the expiration of the statutory period of limitation. Under the 1921 Act, § 250 (d), this period was five years after the return was filed. The Revenue Acts of 1924 and 1926 extended the period for collection to six years after the date of assessment; June 2, 1924, c. 234, § 278 (d), 43 Stat. 253, 300; Feb. 26, 1926, c. 27, § 278 (d), 44 Stat. 9, 59. In both cases proceedings for collection of the tax were begun more than six years after either the tentative or the complete returns were filed, but less than six years after the assessments were made. In the Florsheim case, collection was effected in 1925; in the Hood case, in 1926, after the passage of the 1926 Act.

The Government contends that the "Income and Profits Tax Waivers" executed by the corporations were waivers by them of the statutory period for another year; that while these waivers were still in force and while the corporations' liability was thus still alive, the Revenue Act of 1924 and 1926 were passed, increasing the period for collection to six years after assessment; that these Acts are applicable to the cases at bar; and that, since the collections were made within six years after the assessments, they were timely made. The corporations insist that the "Waivers" were not merely waivers extending the statutory period, but were binding contracts which limited the time in which the Commissioner could assess and collect the taxes; and that no change in the law made after the date of the contracts and enlarging the time for collection can affect their rights. They urge that the 1924 and 1926 Acts did not purport to extend the

periods thus limited by contract; and that, if construed as extending such periods, the provisions of these Acts are unconstitutional. They concede that, in the absence of contract, a legislature may constitutionally lengthen or shorten the period in which a right may be enforced by legal proceedings.

We are of opinion that the contention of the Government must prevail. The waivers executed by the parties were not contracts binding the Commissioner not to make the assessments and collections after the periods specified. At the time when the waivers were executed, the Commissioner was without power under the statute to assess or collect the taxes after the statutory period, as extended by the waivers. A promise by the Commissioner not to do what by the statute he was precluded from doing, would have been of no significance. The waivers do not purport to contain such a promise. *Bank of Commerce* v. *Rose*, 26 F. (2d) 365, 366; *Greylock Mills* v. *Commissioner*, 31 F. (2d) 655, 657. And obviously, the Commissioner did not undertake to limit the power of Congress to extend the period of limitations, as consideration for the waivers. The instruments were nothing more than what they were termed on their face—waivers; and that was all to which the Commissioner was authorized to consent.

Stress is laid on the use of the words "agree" and "agreement" in the Acts and Regulations. But these are ordinary words having no technical significance. It is also urged that, unless a contract was intended, there is no reason why the consent of the Commissioner should have been required. But an otherwise plain meaning should not be distorted merely for the sake of finding a purpose for this administrative requirement. If a reason must be found, it exists in the general desirability of the requirement as an administrative matter. It serves to keep the Commissioner in closer touch with the matters which he

is charged to administer. It avoids claims of improvident execution of waivers and unauthorized exactions by subordinates of the Department for the purpose of curing their own delinquencies. And it provides a formal procedure which is generally desirable for the Commissioner, collectors, and subordinates in the Department. That other means might have been devised for the same purpose is of no significance.

The question as to the applicability of the later Acts may be briefly disposed of. Section 1100 of the Revenue Act of 1924 repealed the 1921 Act. Section 277 (a) (2) of the 1924 Act[9] expressly dealt with taxes due under the Acts of 1918 and 1921; and it reënacted the five year limitation with the express qualification, "Except as provided in section 278." Section 278 (c)[10] reënacted the provision as to extension of time by the consent of the Commissioner and the taxpayer; and constituted the sole statutory authority for the waiver of the period of limitation for taxes due under the 1918 and 1921 Acts. It unquestionably applied to waivers thereafter to be executed; and no reason appears why it did not equally apply to waivers executed prior to the passage of the Act. Section 278 (d)[11] prescribed the period of limitation for the collection of taxes applicable to all cases enumerated in that section and § 277, which expressly included taxes under the Act of 1918. The situations intended to be excluded from the limitations prescribed were carefully specified in § 278 (e)[12]: (1) assessments

[9] § 277 (a) (3) of the 1926 Act.

[10] § 278 (c) of the 1926 Act.

[11] § 278 (d) of the 1926 Act.

[12] § 278 (e) of the 1926 Act. This section eliminated the second exception in § 278 (e) of the 1924 Act, stated in the text. The fact that, in the Hood case, where collection was made after the enactment of the 1926 Act, the assessment had been made previous to that time, is, therefore, immaterial.

or collections already barred before the passage of that Act and (2) assessments made and proceedings begun prior to that time. Neither of the cases at bar falls within those exceptions. Since, in both cases, assessment and collection were not barred on the enactment of the 1924 Act, and were made after that date, the section is applicable. Compare *Russell* v. *United States,* 278 U. S. 181.

It is urged that this construction of the Acts causes discrimination against taxpayers who obligingly consented to additional time for assessment and collection, and in favor of those who obdurately refused such consent or whose returns were not audited, prior to the bar of the statute, for the purpose of assessing deficiencies. That taxpayers whose returns led to no suspicion of inaccuracy prior to the expiration of the statutory period are in a preferable position is due, not to any unjust discrimination contained in the 1924 or 1926 Acts, but to the quality of their returns and to propitious circumstances. For the disobliging taxpayers, the Acts provided an alternative remedy in the so-called jeopardy assessment and demand; 1924, § 274 (d), 43 Stat. 297; 1926, § 279, 44 Stat. 59. It is urged also that the Government may not properly and consistently accept the consent contained in the "Waivers" and not be bound by the limitation. But the limitation was only on the corporations' consent; and the Government was bound thereby. The instruments contained nothing, however, which could restrict the Government's power to enlarge the statutory provisions as to limitation. The timeliness of the collection is based not upon the waivers, but upon the statutes.

No. 118, Affirmed.
No. 414, Reversed.

PIEDMONT & NORTHERN RY. CO. ET AL. *v.* UNITED STATES ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF SOUTH CAROLINA.

No. 164. Argued January 22, 1930.—Decided February 24, 1930.

1. An interstate railway, using only electric power, being about to extend its line, and having been notified by the Interstate Commerce Commission that, before doing so, it would be expected to apply for a certificate of public necessity and convenience, under § 1, pars. 18–22, of the Interstate Commerce Act, made formal application accordingly but therein moved that its application be dismissed for want of jurisdiction, upon the ground that the railway was an interurban electric railway, exempted by par. 22 from the requirement of such a certificate. The Commission assumed jurisdiction and denied the application on its merits. In a suit to set aside the order, *held* that, if the Commission had jurisdiction, its order denying the application, being negative in substance as well as in form and infringing no right of the railway, is not subject to judicial review; while, if the Commission lacked jurisdiction, its order is entirely nugatory and presents no new obstacle to the railway from which it may be relieved by judicial action. P. 476.
2. A remedy which is in substance a declaratory judgment that the railway is within the exemption contained in paragraph 22 of the Act, is not within the statutory or the equity jurisdiction of the federal courts. P. 477.
3. Where a bill in the District Court was dismissed on the merits when it should have been dismissed for want of jurisdiction, the decree must be reversed with directions to dismiss for want of jurisdiction. P. 478.

30 F. (2d) 421, reversed.

APPEAL from a decree of the District Court of three judges dismissing on the merits a suit to set aside, and to enjoin action under, an order of the Interstate Commerce Commission.

Messrs. Charles E. Hughes, Cameron Morrison, H. J. Haynsworth, and *W. S. O'B. Robinson, Jr.,* on behalf of the Piedmont & Northern Railway Co., and *Mr. John E. Benton,* on behalf of the National Association of Railroad and Utilities Commissioners, submitted a jurisdictional statement for the appellants.

I. No complaint is here made with respect to that part of the order merely refusing a certificate of public convenience and necessity. A review of that portion of the order would involve but an exercise by the court of the administrative function of granting a request which the Commission denied. *Chicago Junction Case,* 264 U. S. 258, 264.

But the challenge is directed to that part of the order affirmatively declaring the status of appellant as a carrier within the operation of paragraph 18 of § 1 of the Act. This part was not the result of an administrative function of the Commission, nor was it requested by the appellant. On the contrary, it was a judicial determination of the scope of the statutory authority of the Commission, the occasion for which was brought about solely at the instance of the Commission itself, and over the objection of the appellant. The question whether, upon the facts established, the Commission exceeded its authority under paragraph 18, and thereby deprived appellant of the immunities expressly conferred by paragraph 22 upon interurban electric railways, is purely a question of law and clearly subject to judicial review. *Intermountain Rate Cases,* 234 U. S. 476, 490; *Tap Line Cases,* 234 U. S. 1, 10, 22; *United States* v. *American Ry. Express Co.,* 265 U. S. 425. Contrast, *United States* v. *Los Angeles & S. L. R. Co.,* 273 U. S. 299, 309, 310.

II. That the issue whether appellant is the type of carrier requiring a certificate under paragraph 18 for the "extension" of its lines is justiciable and not declaratory or advisory in character appears from the statement of

this Court in *Texas & Pacific R. Co.* v. *Gulf, C. & S. F. R. Co.*, 270 U. S. 266, 272–273.

The mere form of the order entered, incorporating findings contained in the Commission's report and dismissing the petition without more, does not change its inherent character. The effect of the order in the present case was to grant to various steam railways (which intervened and opposed the petition) the affirmative relief which they sought, namely, that appellant be prevented from constructing the proposed lines, and, as a means of bringing about this end, that the Commission should assume authority over appellant under paragraph 18, and that the certificate required by said paragraph be denied.

Had the Commission refused the relief sought by the interveners, and had it permitted appellant to construct its lines, the interveners would have had the right, on the authority of the *Chicago Junction Case*, 264 U. S. 258, 264, to sue to annul any order of the Commission allowing appellant to complete its lines.

It follows that appellant can sue to annul an order granting the relief sought by the interveners. *United States* v. *New River Co.*, 265 U. S. 533, 537, 539, 541.

That appellant has suffered legal injury by reason of the order is obvious (see *Chicago Junction Case*, 264 U. S. 258). It in effect commands appellant not to build the lines, for unless the status established by the order is removed, appellant cannot construct the proposed lines without subjecting itself to fines and penalties, § 1 (20) of the Act, or issue new securities, § 20–a of the Act, or be free to exercise the power of eminent domain. *Alabama & Vicksburg R. Co.* v. *Jackson & Eastern R. Co.*, 271 U. S. 244.

The following decisions are also believed to sustain the jurisdiction of this Court on appeal: *St. Louis & O'Fallon R. Co.* v. *United States*, 279 U. S. 461; *United States* v. *Missouri Pacific R. Co.*, 278 U. S. 269; *Baltimore*

& Ohio R. Co. v. *United States,* 277 U. S. 291; *Brimstone Railroad & C. Co.* v. *United States,* 276 U. S. 104; *Cleveland, C., C. & St. L. R. Co.* v. *United States,* 275 U. S. 404.

Mr. W. S. O'B. Robinson, Jr., with whom *Messrs. Cameron Morrison* and *H. J. Haynsworth* were on the brief, argued the case for the Piedmont & Northern Railway Co.

Great Northern R. Co. v. *United States,* 277 U. S. 172, when read in connection with *Texas & Pacific Ry. Co.* v. *Gulf, C. & S. F. R. Co.,* 270 U. S. 266, would seem to put at rest all doubt about the jurisdiction of the court below to entertain this suit under the Urgent Deficiencies Act.

The order affirmatively determining the character and status of the mileage in question would, we assume, in view of the decision in the *Texas & Pacific* case, be given binding effect in any future suit or proceeding involving the right of the Railway Company to construct the mileage, unless set aside or annulled. See *Interstate Commerce Commission* v. *Illinois Cent. R. Co.,* 215 U. S. 452, 469, 470; *Interstate Commerce Commission* v. *Union Pac. R. Co.,* 222 U. S. 541, 547; *Interstate Commerce Commission* v. *Louisville & N. R. Co.,* 277 U. S. 88; *Manufacturers Ry. Co.* v. *United States,* 246 U. S. 457, 489.

Mr. John E. Benton, with whom *Mr. Clyde S. Bailey* was on the brief, argued the case for the National Association of Railroad and Utilities Commissioners.

Attorney General Mitchell, Assistant to the Attorney General O'Brian, and *Messrs. Claude R. Branch* and *Charles H. Weston,* Special Assistants to the Attorney General, for the United States, submitted on the brief of the Interstate Commerce Commission.

Mr. Daniel W. Knowlton for the Interstate Commerce Commission.

Mr. Sidney S. Alderman, with whom *Messrs. L. E. Jeffries, S. R. Prince, James F. Wright, Carl H. Davis, F. B. Grier, Edward S. Jouett, Wm. C. Burger* and *James L. McLaughlin* were on the brief, for the Southern Railway Company and other interveners, appellees.

Mr. Justice Brandeis delivered the opinion of the Court.

Paragraph 18 of § 1 of the Interstate Commerce Act, as amended by Transportation Act, 1920, February 28, c. 91, § 402, 41 Stat. 456, 477–8, prohibits any carrier by railroad subject to that Act from undertaking any extension of its lines or construction of new lines, without first obtaining from the Interstate Commerce Commission a certificate of public necessity and convenience. Paragraphs 19 and 20 provide for applications for certificates and prescribe the procedure and mode of disposal. Paragraph 22 exempts from the scope of those provisions the construction of industrial and certain other tracks "located wholly within one State, or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation."

The Piedmont & Northern Railway, a carrier by railroad subject to the Interstate Commerce Act, operates in interstate commerce about 128 miles of line in North and South Carolina, using exclusively electric locomotives. It determined to extend its lines 53 miles on one route and 75 miles on another, in order to connect with several steam railroads; and, believing that the above provisions of the Act were inapplicable, it intended to make the proposed extensions without securing from the Commission a certificate of public necessity and convenience. The Commission, learning informally of the project, advised the Railway by letter that before it "constructs any extensions to its line or issues any securities it will be expected

to file appropriate applications for authority therefor under sections 1 and 20a. The filing of such applications will, of course, be without prejudice to your right to assert that the Commission has no jurisdiction over your property in those respects and to adduce whatever evidence you may desire to support such contention." The letter called attention to the following passage in *Texas & Pacific Ry. Co.* v. *Gulf, Colorado & Santa Fe Ry. Co.*, 270 U. S. 266, 272:

"Whenever such an application is made, the Commission may pass incidentally upon the question whether what is called an extension is in fact such; for, if it proves to be only an industrial track, the Commission must decline, on that ground, to issue a certificate. A carrier desiring to construct new tracks does not, by making application to the Commission, necessarily admit that they constitute an extension. It may secure a determination of the question, without waiving any right, by asserting in the application that in its opinion a certificate is not required because the construction involves only an industrial track."

Upon receipt of this letter, the Railway filed an application for a certificate of public necessity and convenience; and it asserted therein that the proposed extensions were parts of a single project undertaken prior to the effective date of paragraph 18[1] and that it was an interurban electric railway within the exemption of paragraph 22. It accordingly moved that its application be dismissed for want of jurisdiction. The Commission overruled the motion; took jurisdiction; and entered an order denying the application on its merits. *Proposed Construction of Lines by Piedmont & Northern Ry. Co.*, 138

[1] Compare Application of Uvalde & Northern Ry. Co., 67 I. C. C. 554; Application of Texas, Oklahoma & Eastern R. R. Co., 67 I. C. C. 484; Application of Gulf Ports Terminal Ry. Co., 71 I. C. C. 759.

I. C. C. 363. This suit was then brought by the Railway against the United States in the federal court for western South Carolina, under the Urgent Deficiencies Act, October 22, 1913, c. 32, 38 Stat. 208, 219, 220, U. S. C., Tit. 28, § 47, and, as the bill states, also under "the general equity jurisdiction" of the court. The bill charges that if the order is not set aside, the Railway "will be prevented from constructing the new mileage"; and prays for "a permanent injunction decreeing that the Commission was without jurisdiction of the application," that the order "taking jurisdiction of said application and denying the same, be set aside and annulled, and that the Commission be forever enjoined from taking any action or proceeding against your petitioner under said order." The National Association of Railroad and Utility Commissioners intervened as plaintiff. The Interstate Commerce Commission, the Southern Railway and other steam railroads intervened as defendants. The Commission moved to dismiss the bill for want of jurisdiction. The court, three judges sitting, denied the motion; and, the case being submitted on final hearing upon the pleadings and the record before the Commission, entered a decree dismissing the bill on the merits. 30 F. (2d) 421. A direct appeal to this Court was taken by both plaintiffs under § 238 (4) of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936, 938; U. S. C., Tit. 28, § 345.

Plaintiffs do not complain of the order's denial of a certificate of public necessity and convenience. They concede that no court has the power to compel the Commission to issue such a certificate, since no railroad subject to the provisions of the Act has a right to extend its lines. Therefore, the order denying a certificate, being negative in substance as well as in form, infringed no right of the Railway. Compare *Proctor & Gamble Co.* v. *United States*, 225 U. S. 282; *Lehigh Valley R. R. Co.* v.

United States, 243 U. S 412; *United States* v. *New River Co.,* 265 U. S. 533, 540. The plaintiffs have also abandoned, in this Court, their contention that the proposed extensions are part of a project undertaken prior to the effective date of paragraph 18. Their sole contention is that the court below and the Commission erred in not holding that the Railway is an interurban electric railway within the exemption of paragraph 22. The defendants renew their objections to the jurisdiction of the court.

We think that the defendants' objection is well taken. There is no allegation of fact in the bill, and no provision in the statute, which supports the charge that the order will prevent the Railway from proceeding with the construction of the new mileage. The order is wholly unlike a decree which dismisses a bill in equity on the merits when it should have been dismissed for want of jurisdiction. Such a decree must be set aside because, otherwise, it might be held to operate as *res judicata.* Compare *Swift & Co.* v *United States,* 276 U. S. 311, 325–6; *New Orleans* v. *Fisher,* 180 U. S. 185, 196; *Dowell* v. *Applegate,* 152 U. S. 327, 337–41. But neither the assumption of jurisdiction by the Commission nor its denial of the application can operate as *res judicata* of the Railway's claim of immunity. If, as is contended, the Commission was without jurisdiction, the Railway is as free to proceed with the construction as if the application had not been made and the Commission had not acted. Nothing done by the Commission can prejudice the Railway's claim to immunity in any other proceeding.

It is true that, if the Railway builds without having secured a certificate, it may suffer serious loss. For, a court may hold, in an appropriate proceeding, that the Railway is within the purview of paragraph 18. And the Railway may be thus subjected to the penalties prescribed by paragraph 20. These risks arise, however, not from

the order, but from the statute. Compare *Lehigh Valley R. R. Co.* v. *United States,* 243 U. S. 412, 414. The order is entirely negative. It is not susceptible of violation and cannot call for enforcement. It does not finally adjudicate the Railway's standing; nor does it enjoin it to do or refrain from doing anything. The penalties provided in paragraph 20 are prescribed not for violation of an order of the Commission, but for violation of the provisions of the statute. And the apprehended loss will be no greater by virtue of the Commission's order than if the Railway had commenced building without trying to secure a certificate, as was done in *Texas & Pacific Ry. Co.* v. *Gulf, Colorado & Santa Fe Ry. Co.,* 270 U. S. 266. There is no suggestion in the bill how the Commission or the Government could conceivably take any action under the order.

The action taken by the Commission may lend greater justification to the Railway's fear of the uncertainty instinct in the prophecy as to whether it will be held to be an interurban electric within the meaning of paragraph 22. But it does not alter the substance of the remedy sought. That is the same as if the suit had been brought by the Railway prior to any action by the Commission, except that the Railway may be bound by the record made before the Commission. The relief which plaintiffs seek is not from the order but from the uncertainty as to the applicability of the statute. If the statute gives the Commission jurisdiction over the Railway's application, then concededly the order is not subject to attack. If, on the other hand, the statute does not confer the jurisdiction, then obviously the order is no obstacle to the Railway's plans. What plaintiff's are seeking is, therefore, in substance, a declaratory judgment that the Railway is within the exemption contained in paragraph 22 of the Act. Such a remedy is not within either the statutory or the equity jurisdiction of federal courts. Com-

pare *Willing* v. *Chicago Auditorium Association*, 277 U. S. 274; *Great Northern Ry. Co.* v. *United States*, 277 U. S. 172, 182; *Liberty Warehouse Co.* v. *Grannis*, 273 U. S. 70, 74; *United States* v. *Los Angeles & Salt Lake R. R. Co.*, 273 U. S. 299.

There is nothing in the passage from *Texas & Pacific Ry. Co.* v. *United States*, 270 U. S. 266, 272, quoted by the Commission, which is inconsistent with the conclusion stated above. The case is entirely different from those cases where an application for a certificate is alleged to have been erroneously granted, as in *The Chicago Junction Case*, 264 U. S. 258 and *Colorado* v. *United States*, 271 U. S. 153. There, a judicial review is provided in order to protect a legal right of the plaintiff alleged to have been infringed by an order which authorizes affirmative action.

Since plaintiffs' bill was dismissed on the merits when it should have been dismissed for want of jurisdiction, the decree must be reversed with directions to dismiss the bill for want of jurisdiction. *Smallwood* v. *Gallardo*, 275 U. S. 56, 62; *Shawnee Sewerage & Drainage Co.* v. *Stearns*, 220 U. S. 462, 471; *Blacklock* v. *Small*, 127 U. S. 96, 105. Compare *United States* v. *Anchor Coal Co.*, 279 U. S. 812; *Gnerich* v. *Rutter*, 265 U. S. 388, 393; *Brownlow* v. *Schwartz*, 261 U. S. 216, 218.

Reversed with direction to dismiss the bill for want of jurisdiction.

UNITED STATES *v.* GUARANTY TRUST COMPANY OF NEW YORK ET AL.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 402. Argued January 6, 7, 1930.—Decided February 24, 1930.

1. In providing by Title II of the Transportation Act (1) for the funding of indebtedness of railroad carriers to the United States,

incurred for additions and betterments made during Federal Control and properly chargeable to capital account; (2) for the evidencing by notes of other then existing indebtedness of the carriers to the United States; (3) for advances to carriers by the Secretary of the Treasury, upon certification by the Interstate Commerce Commission, on account of the guaranty of operating income for the six months following Federal Control, and for repayment by carriers of amounts advanced in excess of the guaranty; and (4) for loans to carriers, to meet their maturing indebtedness or to provide equipment, etc., for the purpose of enabling them properly to serve the public during the transition period immediately following Federal Control,—Congress intended to exclude the indebtedness so arising from the scope of Rev. Stats. § 3466, which confers priority on debts owed the United States by insolvents. P. 484.

2. This conclusion follows from the general purpose of Title II to rehabilitate railroad credit and preserve the existing transportation system, and from the specific means it provides to insure repayment, other than the priority provision of § 3466. *Id.*

33 F. (2d) 533, affirmed.

CERTIORARI, *post*, p. 546, to review a decree of the Circuit Court of Appeals, which affirmed a decree of the District Court denying priority of payment to claims of the United States against the receiver of an insolvent railroad.

Assistant to the Attorney General O'Brian, with whom *Solicitor General Hughes* and *Messrs. Claude R. Branch, Charles H. Weston* and *Elmer B. Collins*, Special Assistants to the Attorney General, were on the brief, for the United States.

Mr. Charles Bunn, with whom *Messrs. Edwin S. S. Sunderland, Warren S. Carter, Henry V. Poor, Frederick G. Ingersoll, Joseph M. Hartfield, Jesse E. Waid, Norton M. Cross, Kenneth Taylor, James H. McIntosh, Edward H. Blanc* and *James C. Otis* were on the brief, for mortgage trustees, respondents.

Mr. Henry C. Carlson, with whom *Messrs. Charles R. Fowler* and *Mortimer H. Boutelle* were on the brief, for the executors of the estate of H. H. Sheriff, priority creditor, respondents.

Mr. Justice Brandeis delivered the opinion of the Court.

On July 26, 1923, the federal court for Minnesota appointed a receiver of The Minneapolis & St. Louis Railroad upon a creditor's bill, which was later consolidated with suits to foreclose its mortgages. The usual order issued for proof of claims. The United States presented four claims arising under Title II of Transportation Act, 1920, February 28, c. 91, 41 Stat. 456, 457–469. As to each claim it asserted that, by § 3466 of the Revised Statutes, U. S. C., Tit. 31, § 191, it was entitled to preference and priority over the claims of all other creditors, secured or unsecured. Opposing creditors conceded that the Railroad was insolvent within the meaning of § 3466. *United States* v. *Butterworth-Judson Corporation,* 269 U. S. 504. The insistence that the United States did not have priority was rested, among other grounds, upon the origin and character of its claims. The master and the District Court denied the United States priority over any creditor. The Circuit Court of Appeals affirmed that decree, but limited its decision to a denial of priority over secured creditors and those whose claims were preferred by local law or by the rule of *Fosdick* v. *Schall,* 99 U. S. 235. It did not consider the relation of the Government's claims to those of general creditors, because it concluded that the estate would not realize more than enough to satisfy the secured and preferred creditors and because general creditors were not parties to the appeal. 33 F. (2d) 533. A writ of certiorari was granted.

Title II of Transportation Act, 1920, comprising §§ 200 through 211, is headed " Termination of Federal Control."

Section 207 (pp. 462–3), provides that the "indebtedness of each carrier to the United States, which may exist at the termination of Federal control, incurred for additions and betterments made during Federal control and properly chargeable to capital account . . . shall, at the request of the carrier, be funded for a period of ten years from the termination of Federal control, or a shorter period at the option of the carrier"; and also that any other then existing indebtedness to the United States should be evidenced by notes payable in one year from the termination of Federal control, or less at the option of the carrier. For both classes of debts, the carrier is to pay interest at the rate of 6 per cent. per annum and, in the discretion of the President, to give such security as he may require.[1] Two of the claims of the United States here in question are based on promissory notes made pursuant to this section. Each of the two notes is in the amount of $625,000. One is dated May 27, 1922, and is due March 1, 1930, ten years after termination of Federal control; the other is dated April 1, 1923, and is payable on demand. Each bears interest at 6 per cent., payable semi-annually, and is secured by a deposit of the Company's Series A 50-year refunding and extension mortgage bonds, dated January 1, 1912.

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[1] See Report of Director General for the period December 31, 1921, 67th Cong., 2d Sess., H. R. Doc. 180, p. 12: "The total amount expended by the Railroad Administration for such additions and betterments aggregates $1,144,681,582.39. The Transportation Act of 1920 in Section 207, anticipated that the carriers might not be able to pay out of the compensation and other sums due them from the Government all the sums due the Government on account of capital expenditure, and therefore provided that only so much of the indebtedness due from the United States to the carriers should be offset by the indebtedness due the United States from the carriers 'as deemed wise by the President,' and further provided that any funding obtained by the carriers should be granted only upon their giving security in such form and upon such terms as the President may prescribe . . ."

The third claim arose under § 209. That section (at p. 466) authorizes the Secretary of the Treasury, upon certification by the Interstate Commerce Commission, to advance to any carrier, on account of the guaranty of operating income there provided for the six months following the termination of Federal control, sums "necessary to enable it to meet its fixed charges and operating expenses"—the advances to be "secured in such manner as the Secretary may determine"; and provides for repayment by the carrier of any amount proved to have been paid in excess of the guaranty. Compare *Great Northern Ry.* v. *United States*, 277 U. S. 172. The amount claimed by the United States under this section is $292,022.23, which sum the Interstate Commerce Commission certified had been advanced in excess of the guaranteed amount. See *Guaranty Settlement With Minneapolis & St. Louis R. R.*, 86 I. C. C. 691.

The fourth claim arose under § 210, (p. 468). "For the purpose of enabling carriers . . . properly to serve the public during the transition period immediately following the termination of Federal control," that section, as amended by Act of June 5, 1920, c. 235, § 5, 41 Stat. 874, 946, authorizes loans by the Government to carriers, if a loan is required by a carrier " to meet its maturing indebtedness, or to provide itself with equipment or other additions and betterments." The loans are to be made only on security; for a period not in excess of fifteen years; and if application therefor is made to the Interstate Commerce Commission within two years from the termination of Federal control. And no loan can be made, unless the Commission first finds and certifies that the loan is necessary to enable the applicant to meet the transportation needs of the public; " that the prospective earning power of the applicant and the character and value of the security offered are such as to furnish reasonable assurance of the applicant's ability to repay the loan within the time

fixed therefor, and to meet its other obligations in connection with such loan . . . and that the applicant . . . is unable to provide itself with the funds necessary for the aforesaid purposes from other sources." The claim under this section is on a promissory note for $1,382,000 dated April 1, 1921, which was given in consideration of a loan of that amount, made to enable the Company to pay a maturing issue of its outstanding mortgage bonds. The note is payable in ten years, with interest semi-annually at the rate of 6 per cent., and is secured by a deposit of the Company's Series A, 50-year refunding and extension mortgage bonds, dated January 1, 1912. See *Loan to Minneapolis & St. Louis R. R.*, 67 I. C. C. 321, 323; *Bonds of Minneapolis & St. Louis R. R., ibid.*, 362.

The alleged priority of the United States under § 3466 over mortgages and over unsecured claims preferred by local law (compare *Spokane County* v. *United States*, 279 U. S. 80,) or by the rule of *Fosdick* v. *Schall, supra,* was discussed in the lower courts and was argued by counsel before this Court. But we have no occasion to consider these questions. For, we are of opinion that it was the purpose of Congress that § 3466 should not apply to any indebtedness of the railroads to the United States arising under §§ 207, 209 or 210 of Transportation Act, 1920.

During Federal control, the Government had been obliged to provide most of the new capital required for equipment, improvements and extensions,[2] and some of the funds needed to meet current interest and dividend payments.[3] The Federal Control Act, March 21, 1918, c. 25,

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[2] See note 1, *supra.* Of the amount expended for these purposes during Federal control only $140,000,000, approximately, was paid through funds raised by the companies. Report of the Director General to the President for fourteen months ended March 1, 1920 (Revised Edition, 1921,) p. 31.

[3] Mainly for this purpose, the Director General advanced to the carriers between the commencement of Federal control and August 1,

§ 6, 40 Stat. 451, 455, appropriated $500,000,000 "to be used by the President as a revolving fund for the purpose," among other things, of providing "terminals, motive power, cars, and other necessary equipment." The Act of June 30, 1919, c. 5, 41 Stat. 34, appropriated $750,000,000 more. The Transportation Act, 1920, §§ 202 and 210, made a similar provision in appropriating for the purposes of Title II, $500,000,000; in addition to the sums otherwise available and in addition to the general appropriations made in §§ 204 (g) and 209 (g), (h) and (i).

These appropriations were made in order to meet a pressing need. At the time of the passage of Transportation Act, 1920, most of the railroads of the United States lacked funds for necessary improvements, equipment, and expansion of facilities. Some of the carriers needed funds, also, to meet maturing obligations. The credit of many carriers was seriously impaired. There was a general reluctance among investors to purchase new railroad securities even of the strongest railroads. Congress deemed it important to preserve for the nation substantially the whole existing transportation system. Compare *New England Divisions Case,* 261 U. S. 184, 190. In order to accomplish this, it was thought necessary that the United

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1918, $203,714,050. Report of the Director General for period ending July 31, 1918, pp. 23–24. In the statement of the President accompanying his Proclamation of December 26, 1917, on taking possession of the railroads, he had stated: ". . . the financial interests of the Government and the financial interests of the railways must be brought under a common direction. . . . Investors in railway securities may rest assured that their rights and interests will be as scrupulously looked after by the Government as they could be by the directors of the several railway systems." U. S. R. R. Administration Bulletin No. 4 (Revised 1919), p. 10. See also Report of Senate Committee, November 10, 1919, No. 304, 66th Cong., 1st Sess., pp. 3–12; Report of House Committee, November 10, 1919, No. 456, 66th Cong., 1st Sess., pp. 12–13; Walker D. Hines, "War History of American Railroads," p. 120–140.

States should, to a certain extent, finance the carriers until it would become possible to restore their credit, by increase of rates or otherwise. The provisions of Title II of Transportation Act, 1920, were framed to that end. Through them, the financial aid which had been given during Federal control was to be extended for a further period.

To have given priority to debts due the United States pursuant to Title II, would have defeated the purpose of Congress. It not only would have prevented the reëstablishment of railroad credit among bankers and investors, but it would even have seriously impaired the market value of outstanding railroad securities. It would have deprived the carriers of the credit commonly enjoyed from supplymen and others; would have seriously embarrassed the carriers in their daily operations; and would have made necessary a great enlargement of their working capital. The provision for loans under § 210 would have been frustrated. For, carriers could ill afford voluntarily to contract new debts thereunder which would displace, *pro tanto,* their existing bonded indebtedness. The entire spirit of the Act makes clear the purpose that the rule leading to such consequences should not be applied.

Moreover, Congress evidenced unmistakably its purpose to rely, for obtaining payment of the Government's advances, upon means other than the priority provided for by § 3466. Under all of the sections, the giving of adequate security was either required or left to the discretion of the President. Under § 210 no advance could be made, unless the Interstate Commerce Commission was satisfied that the earning power of the carrier and the security given furnished reasonable assurance that the loan would be repaid and all obligations in connection therewith would be performed.[4] The interest rate re-

[4] In some instances the Commission has authorized security which expressly provided only deferred liens. Loan to Chicago, Rock Island

quired is much greater than that which ordinarily accompanies even a business loan carrying such assurance of repayment as would have resulted from an application of the priority rule. Thus, both the general purposes of Title II and its specific provisions make it clear that Congress intended to exclude the indebtedness so arising from the scope of § 3466 of the Revised Statutes, just as under the Federal Control Act it had excluded therefrom claims incident to current operation of the railroads. *Mellon* v. *Michigan Trust Co.*, 271 U. S. 236, 240.

Affirmed.

NEW YORK CENTRAL RAILROAD COMPANY *v.* AMBROSE, ADMINISTRATRIX.

CERTIORARI TO THE CIRCUIT COURT OF HUDSON COUNTY, STATE OF NEW JERSEY.

No. 73. Argued January 10, 1930.—Decided February 24, 1930.

1. In an action under the Federal Employers' Liability Act for a death alleged to have resulted from the negligent failure of the employer to furnish a safe place to work, the plaintiff has the burden of proving that the accident was proximately due to the negligence of the employer, and a verdict resting upon speculation and conjecture can not be sustained. P. 489.
2. In an action under the Federal Employers' Liability Act, a showing that the accident may have resulted from one of several causes, for some of which the defendant was responsible, and for some of which it was not, is not sufficient to establish liability. P. 490.
3. Liability under the rule which requires the master to use reasonable care to furnish a safe place to work ceases when the servant is authoritatively notified that the place is unsafe and is warned to avoid it. P. 490.

Reversed.

& Pac. Ry., 67 I. C. C. 569; Loan to Minneapolis & St. Louis R. R., *ibid.* 580; Equipment Notes of Minneapolis & St. Louis R. R., 70 I. C. C. 67.

CERTIORARI, 279 U. S. 833, to review a judgment of the Circuit Court of Hudson County, New Jersey, against the Railroad Company in an action under the Federal Employers' Liability Act, which was affirmed by the Court of Errors and Appeals, by an equal division of the judges.

Mr. William H. Carey argued the cause, and *Messrs. Albert C. Wall* and *John A. Hartpence* were on the brief, for petitioner.

Mr. A. O. Stanley argued the cause, and *Mr. Alexander Simpson* was on the brief, for respondent.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

This is an action under the Federal Employers' Liability Act for the death of John Ambrose, as the result of an alleged negligent failure of the railroad company to furnish a safe place to work.

Ambrose had been employed for many years in a grain elevator belonging to the company and used to facilitate the shipment of grain in interstate commerce. He worked on the "bin floor," which lies above a large number of grain bins, and with each of which it is connected by a circular opening, seventeen inches in diameter, furnished with a spout to carry the grain from the floor into the bin, and by a rectangular manhole, twenty by sixteen and three-quarter inches in size. These openings, when not in use, are closed with metal covers resting on flanges and sunk to a level with the floor.

Ambrose's duties were to sweep the floor, help set the spouts, and generally to do such floor work as his foreman might direct. Sometimes grain became clogged so that it would not run out from the bin; in which event one man would descend into the bin to clean it out, while another lowered and held a light in such position as to assist the former in the performance of his work.

This work was rarely done and only upon an order from the foreman or superintendent.

A short time prior to the accident, with the consent of the superintendent, a representative of a company not connected with the railroad was permitted to make an experiment in one of the bins for the extermination of weevil and other insects, which sometimes got into the grain. This experiment was conducted by mingling with the grain, as it moved through the bin, a powder, which generated a poisonous gas supposed to destroy the insects. In conducting the experiment, forty small bags containing weevil were dropped into the grain. After the experiment, one of the bags which had failed to come through was found lodged within the bin, but it was not intended or thought necessary to remove it. Ambrose was present when the foreman lowered a droplight into the bin and disclosed the bag, and was told by the foreman to keep away from the bin as much as possible, not to "hang around" it, that the gas was poisonous.

The following morning the only men at work on the floor were the foreman, Ambrose, and another employee. Both covers were in place, and Ambrose was engaged in sweeping the floor. The foreman went to another part of the premises, but, about twenty minutes later, hearing a noise "like something hitting," returned to the floor. He then found the covers of both openings off, and an electric droplight hanging through the spouthole into the bin. Looking down he saw Ambrose's body lying at the bottom. There is no evidence to show how the covers were removed or the circumstances under which Ambrose entered the bin and so came to his death.

The case was tried before a state circuit court, and the jury returned a verdict for the respondent, upon which there was a final judgment. Upon appeal to the New Jersey Court of Errors and Appeals, the judges were

equally divided; and the judgment, because of that division, was affirmed.

We are of opinion that there must be a reversal because the evidence fails to establish negligence on the part of the railroad company. That the bin was a dangerous place does not admit of doubt. It contained a poisonous gas of the most deadly character. But of this Ambrose was informed. Not only was there no duty on his part to enter the bin, unless ordered to do so, but he had been specifically told of its dangerous character and warned to keep away as much as possible.

It is said the jury could have found that a signal had been given to get the spouts ready, to which Ambrose responded; or that Ambrose found it necessary, within the scope of his employment while sweeping the floor, to adjust the covers of the openings, and in so doing was overcome by the gas and fell into the bin. But these are mere surmises, not legitimate inferences deducible from the proved facts. Considering the limited size of the openings, it is beyond reasonable belief that Ambrose could have *fallen* through either of them. In the absence of positive evidence to the contrary, the more rational conclusion is that he passed through the manhole by conscious and deliberate effort; and to that conclusion, the fact that the covers of both openings were off, with a droplight hanging through the smaller one, lends a noticeable degree of plausibility. True, in the face of the warning that the bin was dangerous and to keep away from it as much as possible, it is hard to find any good reason for such voluntary entrance on his part; but it is more difficult to account for the tragedy in any other way.

In any view of the matter, the respondent (plaintiff), upon whom lay the burden, completely failed to prove that the accident was proximately due to the negligence of the company. It follows that the verdict rests only

upon speculation and conjecture, and can not be allowed to stand. *C. M. & St. P. Ry.* v. *Coogan*, 271 U. S. 472, 478, and cases cited.

The utmost that can be said is, that the accident may have resulted from any one of several causes, for some of which the company was responsible, and for some of which it was not. This is not enough. See *Patton* v. *Texas & Pacific R. Co.*, 179 U. S. 658, where, at page 663, this court said:

"The fact of accident carries with it no presumption of negligence on the part of the employer, and it is an affirmative fact for the injured employé to establish that the employer has been guilty of negligence. . . . it is not sufficient for the employé to show that the employer may have been guilty of negligence—the evidence must point to the fact that he was. And where the testimony leaves the matter uncertain and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not, it is not for the jury to guess between these half a dozen causes and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion. If the employe is unable to adduce sufficient evidence to show negligence on the part of the employer, it is only one of the many cases in which the plaintiff fails in his testimony, and no mere sympathy for the unfortunate victim of an accident justifies any departure from settled rules of proof resting upon all plaintiffs."

It is scarcely necessary to add that a recovery can not be predicated upon the theory that Ambrose, of his own accord, entered the bin. Whatever previously would have been the liability of the company, in virtue of the rule which requires the master to use reasonable care to furnish a safe place to work, there was no liability under that rule at the time of the accident, since, manifestly,

the rule ceases to be operative whenever, and as long as, the place is closed against the servant, and he is authoritatively notified that it is unsafe and warned to avoid it. The master who furnishes the place may, of course, abandon or suspend its use, whenever he discovers that it has ceased to be safe; and a servant, so notified and warned, who ignores the notice and warning, does so at his own risk.

Judgment reversed.

BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY *v.* CARROLL, ADMINISTRATRIX.

CERTIORARI TO THE SUPREME COURT OF INDIANA.

No. 87. Argued January 15, 1930.—Decided February 24, 1930.

1. Where the plaintiff in an action in damages for personal injuries dies pending an appeal from a judgment in his favor, the judgment subsequently being reversed and remanded by this Court for a new trial on the ground that the Federal Employers' Liability Act and not state law was applicable, an amendment of the complaint by the administrator so as to include a claim for damages on account of the death introduces a new cause of action and can not be allowed if the two-year period of limitation has already run against that cause of action. P. 494.
2. Under the Federal Employers' Liability Act, the cause of action which arises from death accrues, and the two-year period of limitations begins to run, at the time of the death. P. 495.
3. A judgment based on a verdict awarding a single sum as damages upon two causes of action, one for personal injuries and the other for death resulting therefrom, must be reversed if one of the causes of action was erroneously allowed to go to the jury, and must be sent back for retrial on the other cause of action. P. 495.
4. The duty of the employer to provide a safe place to work and safe working appliances is not absolute; he is held only to the exercise of reasonable care to that end. P. 496.

200 Ind. 589, reversed.

CERTIORARI, *post*, p. 537, to review a judgment of the Supreme Court of Indiana, which affirmed a judgment against the Railroad Company in an action under the Federal Employers' Liability Act.

Mr. William A. Eggers, with whom *Messrs. Morison R. Waite, Harry R. McMullen* and *Cassius W. McMullen* were on the brief, for petitioner.

Mr. Oscar H. Montgomery, with whom *Messrs. T. Harlan Montgomery* and *William J. Hughes* were on the brief, for respondent.

The liability created by § 1 of the Federal Employers' Liability Act is for both injury and death resulting from certain specified negligence. This liability is readily distinguishable from that given for death by statutes patterned after Lord Campbell's Act. Such statutes merely modify the common law to the extent that an action is given to specified beneficiaries for a death which is the result of any wrongful act.

The federal Act is exclusive in its field, and, by amendment, was intended to grant all the relief afforded by the statutes of any of the States under like circumstances. Death and survival acts, in a number of States, authorized recovery of damages resulting to an injured employee, and also resulting to his widow and children from his death because of the negligent or wrongful act of his employer.

The amendment of April 5, 1910, provides that "any right," or the entire right of action, so given, not for personal injuries only, nor for death only, but for both, shall survive; but, that there shall be only one recovery.

The cause of action in this case is not barred, since suit was timely brought; but the effect of the amendment to the federal statute is to permit and require all damages, both to decedent in his lifetime, by reason of the injury, and to his widow and children, by reason of his death, to be merged upon his death and to be recovered in one

action for the benefit of his widow and children. *St. Louis, I. M. & S. R. Co.* v. *Craft,* 237 U. S. 648; *Great Northern R. Co.* v. *Capital Trust Co.,* 242 U. S. 144; *Kansas City Southern R. Co.* v. *Leslie,* 238 U. S. 599; *Moffett* v. *Baltimore & O. R. Co.,* 220 Fed. 39; *Northern Pac. R. Co.* v. *Maerkl,* 198 Fed. 263; *Illinois Cent. R. Co.* v. *O'Neill,* 177 Fed. 328; 217 U. S. 604.

The decision of this Court in *St. Louis, I. M. & S. R. Co.* v. *Craft, supra,* awarding damages both for personal injuries and death in the same action, under the amended federal Act, has been followed in many cases.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

The deceased, Guerney O. Burtch, sustained personal injuries while assisting to unload a heavy ensilage cutter from a freight train operated by petitioner. He sued in a state court, and recovered damages on the theory that state law, and not the Federal Employers' Liability Act, applied. This court reversed the judgment, holding that the federal act applied, and remanded the cause for a new trial. On February 10, 1921, while the appeal was pending in the state supreme court, Burtch died, and his widow (now Lula Carroll) was appointed administratrix. Upon her application she was substituted as respondent in this court. *B. & O. S. W. R. R.* v. *Burtch,* 263 U. S. 540.

Three years after the death of Burtch when the case was back in the state court of first instance, respondent, by leave of that court, amended the complaint, and, among other things, alleged for the first time the death of Burtch as a result of the injury, and demanded judgment in a single sum for the loss and injury sustained by the deceased during his lifetime and the pecuniary loss resulting from his death. A motion to require respondent to state these claims as separate causes of action was over-

ruled. The answer affirmatively alleged that in so far as the amended complaint was based upon the death of Burtch, the cause of action was barred because not brought within two years, as required by § 6 of the act (U. S. Code, Title 45, § 56), which provides that no action shall be maintained under the act unless commenced within two years from the day the cause of action accrued. The jury returned a verdict for respondent and the judgment thereon was affirmed by the state supreme court.

In respect of the statute of limitations, that court held that the challenged amendment did not introduce a new cause of action, but was a mere amplification of the original complaint and related back to the commencement of the action. In support of the ruling, reliance was had upon the decisions of this court that neither an amendment for the first time setting up the right of the plaintiff to sue as personal representative, *Mo., Kans. & Tex. Ry.* v. *Wulf,* 226 U. S. 570, nor an amendment for the first time alleging that the parties were engaged in interstate commerce, *N. Y. Cent. R. R.* v. *Kinney,* 260 U. S. 340, introduces a new cause of action. Each of these decisions proceeds upon the ground that the amendment did not set up any different state of facts as the ground of action, and therefore it related back to the beginning of the action. In the *Kinney* case it was pointed out that the original declaration was consistent with a wrong under either state or federal law, as the facts might turn out; and that the acts constituting the tort were the same, whichever law gave them that effect.

But here two distinct causes of action are involved, one for the loss and suffering of the injured person while he lived, and another for the pecuniary loss to the beneficiaries named in the act as a result of his death. *St. Louis & Iron Mtn. Ry.* v. *Craft,* 237 U. S. 648, 658; *C., B. & Q. R. R.* v. *Wells-Dickey Trust Co.,* 275 U. S. 161, 162. In the *Craft* case it was said: "Although originating in the same

wrongful act or neglect, the two claims are quite distinct, no part of either being embraced in the other. . . . One begins where the other ends, and a recovery upon both in the same action is not a double recovery for a single wrong but a single recovery for a double wrong." And in the *Wells-Dickey* case it was explicitly held that for an injury resulting in death the act gives two distinct causes of action.

The statute, it is true, provides that " there shall be only one recovery for the same injury "; but this has the effect not of merging the two rights into a single cause of action, but of limiting the personal representative " to one recovery of damages for both, and so to avoid the needless litigation in separate actions of what would better be settled once for all in a single action." *St. Louis & Iron Mtn. Ry.* v. *Craft, supra,* p. 659.

The cause of action which arises from death accrues at the time of death, and the two-year period of limitation then begins. *Reading Co.* v. *Koons,* 271 U. S. 58. Here, more than two years having passed, the amendment, introducing as it did a new and distinct cause of action, does not relate back to the beginning of the action so as to avoid the bar of the statute of limitations, *Union Pacific Railway* v. *Wyler,* 158 U. S. 285, 296–298; and since the verdict of the jury was for a single sum, including an undetermined amount as damages for the death, the judgment must be reversed and the cause remanded for a new trial only upon the alleged cause of action for the personal injuries suffered by the deceased.

The court below gave weight to the fact that this court, in disposing of the former appeal, remanded the cause for a new trial, and suggests that this would not have been done if the complaint was not subject to amendment so as to allow a submission of the case to a jury under the federal act. It is enough to say that on the former appeal the right to maintain an action on account of

Burtch's death was in no way involved; and there is no warrant for assuming that this court had in mind any future proceedings in respect thereof.

We do not stop to discuss the complaint, rather faintly urged, that the trial court gave conflicting and improper instructions to the jury on the subject of assumption of risk. That question received the consideration of this court in *Texas & Pacific Railway* v. *Archibald,* 170 U. S. 665, 671, and *Choctaw, Oklahoma &c., R. R. Co.* v. *McDade,* 191 U. S. 64, 68, and the rule to be followed in any subsequent trial of this case will there be found fully and carefully stated. Under the rule established by these cases, some of the instructions of the court were over favorable to the railroad company rather than the reverse. On the other hand, the charge in respect of the duty of the employer to furnish safe appliances was without qualification, and the jury might well have understood that the duty was an absolute one. That is not the law. The employer is not held to an absolute responsibility for the reasonably safe condition of the place, tools and appliances, but only to the duty of exercising reasonable care to that end. *Seaboard Air Line* v. *Horton,* 233 U. S. 492, 502; *Yazoo & M. V. R. R. Co.* v. *Mullins,* 249 U. S. 531, 533.

Judgment reversed.

EARLY, RECEIVER, *v.* RICHARDSON.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

No. 133. Argued January 21, 22, 1930.—Decided February 24, 1930.

1. When the purchaser of stock of a national bank receives from the seller the certificates properly endorsed, title passes and the transfer is complete as between the parties; and, as between them, the purchaser alone becomes liable for assessments thereafter imposed on the shares. P. 498.

2. The actual owner of stock of a national bank may be held for an assessment thereon although his name does not appear upon the transfer books of the bank. P. 499.
3. One who in good faith purchases stock of a national bank with the intention of making a gift thereof to his minor children, and causes the transfer to be made to them upon the books of the bank and certificates to be issued in their names, is, nevertheless, liable for assessments on the stock made subsequently for the benefit of creditors, when the bank becomes insolvent, since the transferees, being minors, are without legal capacity to assume the obligation, and the transfer, having resulted to their disadvantage, will be avoided for them by the law. P. 499.
4. One who purchases stock of a national bank with his own money as a gift for his minor children, and causes the certificates to be issued and registered in their names, does not become a trustee for the minors. P. 500.

ANSWER to a question certified by the Circuit Court of Appeals on an appeal from a judgment for the respondent, who resisted payment of an assessment on shares of national bank stock.

Mr. R. E. Whiting, with whom *Mr. D. E. Ellerbe* was on the brief, for Early.

Mr. A. C. Hinds, with whom *Mr. H. E. Davis* was on the brief, for Richardson.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

The court below has certified to this court the following question of law upon which instruction is desired:

"Is one, who purchases shares of stock of a national bank, liable for an assessment subsequently imposed by the Comptroller of the Currency upon the stock for the benefit of the creditors of the bank after the insolvency thereof, when it appears that the purchaser bought the stock from the registered holder thereof and received a certificate therefor endorsed in blank by the holder, with

intent at the time of such purchase and delivery of giving the stock to his minor child, but without knowledge at that time of the failing condition of the bank, or intent to avoid the stockholder's liability, and when, after the acceptance of the endorsed certificate from the seller, and before the insolvency, the purchaser with like knowledge and intent, promptly presents the certificate to the bank, causes the shares to be registered and a new certificate to be issued in the child's name?"

The suit was brought to recover the amount of an assessment upon nineteen shares of the capital stock of the bank ordered by the Comptroller of the Currency because the assets of the bank were insufficient to pay creditors. Richardson had purchased the stock and received three certificates therefor endorsed in blank by the seller. He delivered these certificates to the bank with verbal instructions to register the stock and issue two new certificates for sixteen shares in the name of his minor son, and another one for three shares in the name of his minor daughter. This was done, the new certificates being retained in the custody of the bank.

When Richardson bought the stock and received the certificates therefor, endorsed by the seller, title passed and the transfer was complete as between the parties. *Johnston* v. *Laflin,* 103 U. S. 800, 804. Thereupon, as between seller and purchaser, the purchaser alone became liable for any assessment thereafter imposed; for, as between them, it would be in disregard of all equitable principles to continue against the seller the burdens of ownership after the purchaser had become entitled to all the benefits including the receipt of dividends. Whether under the facts the liability of the seller continued, as between him and the creditors, is a different matter not necessary to be considered; for, in any event, the purchaser, who alone is sued, is not concerned with that question.

That the actual owner of the stock may be held for the assessment although his name does not appear upon the transfer books of the bank, is well settled. *Ohio Valley National Bank* v. *Hulitt,* 204 U. S. 162, 167, 168; *Davis* v. *Stevens,* 17 Blatchf. 259, s. c. 7 Fed. Cas. 177, 178; *Case* v. *Small,* 10 Fed. 722, 724; *Houghton* v. *Hubbell,* 91 Fed. 453.

The real question is whether the intent of Richardson to buy the stock for his minor children, and the fact that by his direction the transfer was made to them upon the books of the bank and certificates issued in their names, had the effect of relieving Richardson from liability. We think not, since the transferees, being minors, were without legal capacity to assume the obligation. Upon coming of age they would have an election either to affirm or avoid the entire transaction. In the meantime, the transfer of the stock having resulted to their disadvantage, the law will avoid it for them, thus leaving the liability of Richardson for assessments unaffected. See *Aldrich* v. *Bingham,* 131 Fed. 363; *Foster* v. *Chase, Foster* v. *Wilson,* 75 Fed. 797.

In *Foster* v. *Chase, supra,* the father bought stock in the names of his minor children, and suit was brought against him for the amount of an assessment. Disposing of the point here presented the court well said:

"The plaintiff claims that the defendant made himself liable for the assessment because of the incapacity of his children to take the stock and make themselves liable for it. He insists that they only are the shareholders, and liable, if any one is. Assent is necessary to becoming a shareholder, subject to this liability, in a national bank. *Keyser* v. *Hitz,* 133 U. S. 138, 10 Sup. Ct. 290. Minors do not seem to have anywhere the necessary legal capacity for that. The principles upon which this disability rests are elementary and universal. 1 Bl.

Comm. 492; 2 Kent, Comm. 233. In buying and paying for this stock, and having it placed on the books of the bank, the defendant acted for himself; in having it placed there in the names of his children, as with their assent, he assumed to act for them. As they could not themselves so assent as to be bound to the liabilities of a shareholder, they could not so authorize him to assent for them as to bind them. To the extent that they could not be bound he acted without legal authority, and bound only himself. Story, Ag. § 280."

There is no merit in the point, made in argument, that Richardson was a trustee for the minors, even if that would enable him to avoid personal liability, *Johnson* v. *Laflin,* 5 Dillon 65, 82; and there is nothing certified by the court below which furnishes a basis for the suggestion. Richardson, having bought with his own money, became the owner of the stock. And although the purchase was made with the intent of giving the stock to his children, *non constat* that he would not change his mind, as he was perfectly free to do. The new certificates simply were issued and registered in the names of the children, and this, if effective, would have resulted only in consummating an ordinary gift. It no more created a trust than if the donees had been persons *sui juris.* The question must be answered in the affirmative.

It is so ordered.

WHITE ET AL. *v.* SPARKILL REALTY CORPORATION ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 336. Argued January 7, 1930.—Decided February 24, 1930.

1. A suit in equity for an injunction to eject state officials from land, of which they have taken exclusive possession under claim of right pursuant to a state expropriation statute, will not lie in a

federal district court, even though the validity of the statute under the federal Constitution be challenged by the bill. The remedy at law is adequate. P. 510.

2. Section 274a of the Judicial Code (U.S.C., Title 28, § 397) and Equity Rule 22, providing for transfer to the law side of the court of actions at law erroneously begun as suits in equity, refer only to cases of which the court would have jurisdiction if they were brought on the law side; and if the case be one which, if brought as an action at law, would not be within the jurisdiction of the federal court, then the bill must be dismissed, but without prejudice to an action in a court of competent jurisdiction. P. 512.
3. In the absence of diversity of citizenship, the federal district court has no jurisdiction of an action in ejectment, if the complaint, confined to an orderly statement of the cause of action, without anticipating possible defences, does not present a case arising under the Constitution, or a treaty or law, of the United States. P. 512.

Reversed.

APPEAL from a decree of a district court of three judges granting an interlocutory injunction against the appellants to restrain them from continuing in possession of certain real property.

Mr. Walter H. Pollak, with whom *James Gibson,* Second Assistant Attorney General of New York, *Carl S. Stern* and *Ruth I. Wilson* were on the brief, for appellants.

I. That the pledge of the general credit of the State assures just compensation and satisfies the constitutional requirement of due process has been decided so often by this Court that a contention to the contrary does not raise a substantial federal question.

II. Every provision of the New York constitution and statutes that the court below took as a reason for rejecting the principle settled by this Court, is in reality but an additional reason for applying that principle.

III. Appellees' objections to being compensated out of moneys authorized by the people in 1924, appropriated by the Legislature in 1926 and reappropriated in 1928,

are without color of merit. It cannot be assumed that the New York courts would sustain them and they cannot be made to serve as a basis for the jurisdiction of the federal courts.

IV. Appellees are not injured by having their compensation paid out of funds derived from the bond issue of 1924. They are therefore without standing to raise the questions of New York law on which they predicate their so-called federal question.

V. The bill of complaint does not even allege the facts necessary to present the unsubstantial question of due process upon which jurisdiction was invoked. It fails to show that the funds available for appellees' compensation at the time of the entry and appropriation were even upon appellees' own theory inadequate. Nor does it show any obstacle to the use of moneys derived from the bond issue of 1924 other than appellees' own objections.

The jurisdiction of the federal courts cannot be based upon a question purely hypothetical.

VI. The only prospective relief appellees asked was that appellants be enjoined "from continuing in possession of plaintiffs' said property,"—in other words that appellees themselves be restored to possession by injunction.

The relief asked under the guise of an equity bill and prayer for injunction is thus nothing more or less than the relief a judgment in ejectment would give. The equity jurisdiction of the federal courts does not extend to such a case. *United States* v. *Wilson,* 118 U. S. 86; *Whitehead* v. *Shattuck,* 138 U. S. 146; *Lacassagne* v. *Chapuis,* 144 U. S. 119; *Black* v. *Jackson,* 177 U. S. 349, 361, 363; *Boston & Montana Mining Co.* v. *Montana Ore P. Co.,* 188 U. S. 632; *Denison* v. *Keck,* 13 Fed. (2d) 384; *Johnston* v. *Corson Gold Mining Co.,* 157 Fed. 145.

Nothing is pleaded to take the case out of the rule. Inadequacy of legal remedy is the test of equity jurisdiction,—" the only test of jurisdiction " in the federal courts (*Payne* v. *Hook,* 7 Wall. 425, 430; *McConihay* v. *Wright,* 121 U. S. 201, 206; *Indiana Mfg. Co.* v. *Koehne,* 188 U. S. 681, 690) and the test applied in this class of cases (*Lancaster* v. *Kathleen Oil Co.,* 241 U. S. 551, 555)—and there is nothing in the bill to show that the legal remedy of ejectment is inadequate. The only " irreparable " damage alleged is said to be caused by appellants' " continued unlawful occupation " and by " impossibility of operation." There is nothing alleged that even suggests that the officials of the State of New York, who are the defendants, would dispute title and right to possession in the face of a judgment against them in ejectment.

That the bill shows no ground of equity jurisdiction is fatal to the jurisdiction of the statutory court,—to the jurisdiction of any federal court of equity. That the suit in reality is in ejectment defeats the jurisdiction of the federal court even on the law side. For an ejectment action is not one arising " under the Constitution or the laws of the United States," and in the absence of diversity of citizenship an ejectment action will not lie in the federal courts. *Taylor* v. *Anderson,* 234 U. S. 74; *Deere* v. *New York,* 22 Fed. (2d) 851; *Florida Central & P. R. Co.* v. *Bell,* 176 U. S. 321, 325; *Joy* v. *St. Louis,* 201 U. S. 332, 340.

It is not only in the plaintiff's statement of his own case, it is in his statement of the facts essential to his case, that the federal question which will support jurisdiction must be found. And since in an ejectment action it is not incumbent upon the plaintiff to state the source of his title, he cannot, even by pleading that the Federal Government was the source, give jurisdiction to the fed-

eral courts, as this Court flatly decided in the last two cases cited.

Mr. Jackson A. Dykman, with whom *Mr. William H. Dykman* was on the brief, for appellees.

I. No power exists to pledge the credit of New York.

II. A taking of property in eminent domain is a violation of due process unless there is provided a sure, efficient and convenient remedy by which the owner can coerce payment of just compensation.

III. No enforceable means of obtaining compensation has been provided.

IV. Being without the means of enforcing payment of compensation appellees are injured and may raise the questions presented.

V. All facts essential to the presentation of the federal question appear by allegations of the bill.

VI. Public bodies will be enjoined from illegal acts done under color of right which cause irreparable injury to the property rights of individuals.

The bill rests upon an absence of lawful power to enforce a statute and an abuse of authority, and its merits must be determined accordingly; it is concededly not a suit against the State.

It is established by the decisions of the Court of Appeals of New York that a peculiar jurisdiction exists in equity to prevent illegal acts of public officers under color of right which injuriously affect the property rights of individuals. The same rule will be applied in this Court. *Smith* v. *Reeves,* 178 U. S. 436, 444; *Litchfield* v. *Bond,* 186 N. Y. 66, 85; *Flood* v. *Van Wormser,* 147 N. Y. 284, 289.

Plaintiff's title being already established, an action at law for that purpose is unnecessary, and equity will grant injunctive relief to prevent an injury which is not a mere

fugitive trespass. *Baron* v. *Korn,* 127 N. Y. 224, 228; *Bloomquist* v. *Farson,* 222 N. Y. 375.

This recent decision of the highest court establishes that in New York adequacy of legal remedy is an affirmative defense which must be pleaded and cannot be raised upon a motion to dismiss the complaint. No answer is in the record and we assume appellants will concede that in the answer filed after the submission below the only plea of this nature is an allegation that appellees may obtain a judgment in the Court of Claims.

The same jurisdiction to restrain public officers acting under color of right is recognized in the federal courts. *Osborn* v. *Bank,* 9 Wheat. 738.

Concededly appellees were about to commence operations. They find themselves deprived of their property "daily suffering great loss from the continued unlawful occupation of their property, deterioration of buildings and machinery and impossibility of operation." The Commission "may at any time enter upon the destruction and demolition of the plant" which it took one year to erect at a cost of one million dollars and which it would take as much time and probably more money to replace. Meanwhile appellee Standard Trap Rock Corporation has earned no return on its capital and paid no dividends. If the property is destroyed it is not at all likely new capital will be forthcoming to replace the plant; so that success without injunctive relief will not stay execution of the death warrant.

The land taken for a park will meanwhile be overrun by some of the millions whose "recreational needs" will be satisfied only when every last vestige of moveable property has disappeared from the lands. A multiplicity of suits would result.

Under such circumstances the federal courts grant mandatory injunctions restoring possession. *Pokegama S. P.*

Lumber Co. v. *Klamath River Lumber & Imp. Co.*, 86 Fed. 528; on final hearing 96 Fed. 34; *Slaughter* v. *Mallet Land & Cattle Co.*, 141 Fed. 282, 288; *Love* v. *Atchison, T. & S. F. R. Co.*, 185 Fed. 321, 333; *Percy Summer Club* v. *Astle*, 145 Fed. 53, s. c. 163 Fed. 1.

In many varieties of action it is established in this Court that violation of the federal constitution by state officers may be enjoined. *Western Union Tel. Co.* v. *Andrews*, 216 U. S. 165; *Big Six Development Co.* v. *Mitchell*, 138 Fed. 279; *Twist* v. *Prairie Oil Co.*, 274 U. S. 684, 691; *United States Freehold Land & Emigration Co.* v. *Gallegos*, 89 Fed. 769, 773.

VII. The interlocutory decree is proper and grants proper relief.

Mr. Justice Sutherland delivered the opinion of the Court.

This in form is a suit in equity against the members of the Board of Commissioners of the Palisades Interstate Park, appointed pursuant to a statute of the State of New York, the Attorney General and the Commissioner of the Conservation Department of the state. The bill was filed March 19, 1929, and alleges that the Sparkill Realty Corporation is the owner in fee of lands lying within the southern district of New York, of which the Standard Trap Rock Corporation is lessee. The lands contain valuable deposits of "trap rock"; and the Standard Trap Rock Corporation, in preparing to develop the deposits, contracted for the erection and equipment of a plant, not adapted for use elsewhere, thereby subjecting itself to liabilities exceeding $1,000,000.

While this work was in progress, estimates and maps, as required by state law, for the acquisition of these and other lands for a state park, were approved by the board and certain state officers. Notice was served on appellees

that a description of the lands, certified as correct, had been filed with the Secretary of State; and that the lands had been appropriated by the people of the state for public and state park purposes, pursuant to the state statutes. Thereupon, the bill alleges, the Board of Commissioners, on October 11, 1928, "wrongfully entered upon the said real property of plaintiffs [appellees] and converted the personal property thereon to their own use and have since remained in possession of said real and personal property and prevented its use, enjoyment, occupation and operation by plaintiffs for any purpose to plaintiffs' great and continuing damage."

It is further averred that the sum of $500,000 was allocated to the acquisition of the property, but that the value of the property exceeds $3,000,000; that appellees are suffering daily loss from the "continued unlawful occupation of their property," the aggregate sum of which will be such that the damage will be irreparable and destructive of appellees' property; and that, therefore, they are without adequate remedy at law.

The prayer is, that the acts of the board and state officers, and the statutes of the state purporting to authorize them, be declared invalid as violating the Fourteenth Amendment and other provisions of the federal Constitution, as well as a provision of the state Constitution; and that appellants be enjoined from attempting to enforce the provisions of the statute, notice, description or certificate, or proceeding against appellees at law or in equity to compel compliance with, or inflicting or recovering any penalty, forfeiture or damage for noncompliance by appellees with the statute, notice, description or certificate, or "from continuing in possession of plaintiffs' said property."

The statutory provisions assailed as unconstitutional are found in §§ 59 and 761 of the New York Conservation

Law, L., 1928, chap. 242. Section 761 confers upon the Commissioners of the Palisades Interstate Park power to acquire lands by entry and appropriation in the manner provided for in § 59. Section 59 authorizes the Conservation Department to enter upon and take possession of lands, etc., which, in the judgment of the department, shall be necessary for public park purposes, or for the protection and conservation of the lands, forests and waters within the state. A description of the property to be entered upon must be made and certified, which, together with a notice endorsed thereon that the property described is appropriated by the people of the state, shall be filed in the office of the Secretary of State. A duplicate must be served on the owner or owners of the lands, etc., and " thereupon such property shall become, and be, the property of the people of the state." Provision is made for an adjustment of compensation for the property and legal damages, and the issue of a certificate stating the amount due; which amount shall be paid out of the state treasury upon the audit and warrant of the Comptroller. It is further provided that any owner may present to the state Court of Claims a claim for the value of the land and damages; and the court is authorized to hear and determine such claim and render judgment thereon. The Comptroller is directed to issue his warrant for the payment of the amount, with interest from the date of the judgment until the thirtieth day after the entry of final judgment; and such amount shall be paid out of the state treasury.

Upon filing the bill it was ordered that appellants show cause before a court of three judges, constituted under § 266 of the Judicial Code (U. S. C. Title 28, § 380), why an interlocutory injunction should not issue. A hearing was had upon affidavits submitted by both parties. The affidavit of James G. Shaw, on behalf of appellees, con-

tains the statement that, acting under the statutory provisions above set forth, the property in question was "appropriated by the people of the state of New York for public and state park purposes with the approval of the Governor"; and that the commissioners "thereafter entered upon and took possession of said property, of which they have since retained possession to the exclusion of the plaintiffs." The affidavit of J. Du Pratt White, President of the Board of Commissioners of the Palisades Interstate Park, sets forth that, after the appropriation papers were served, appellees ceased doing any work on the property; that the contractors and other persons engaged in doing work left, taking their machinery and tools with them, and certain movable property and equipment used or for use in connection therewith was likewise removed from the premises; and that the state, through the commission, had, since October 11, 1928, been in exclusive possession of the property as a state park. These excerpts from the affidavits are not controverted.

Appellant submitted a motion to dismiss the bill on the ground, among others, that it did not state facts sufficient to constitute a valid cause of action in equity against the defendants. The court below denied the motion to dismiss and granted an interlocutory injunction in accordance with the prayer of the bill. The state statute was held invalid for the reason that it authorized the taking of private property for public use without just compensation, or making adequate provision for payment thereof. In respect of its denial of the motion to dismiss, the court simply said that the action was not one for ejectment, and cited *Hopkins* v. *Clemson College,* 221 U. S. 636; *United States Freehold Land & Emigration Co.* v. *Gallegos,* 89 Fed. 769.

We do not consider the question of the constitutionality of the state legislation, because it is apparent from the

bill and affidavits that the bill should have been dismissed on the ground that appellees had an adequate remedy at law.

The Board of Commissioners, acting for the state, entered upon the lands and had been in the exclusive possession thereof for several months before the filing of the bill, effectively preventing appellees from using, enjoying or occupying the property. The relief sought was to enjoin appellants "from continuing in possession," that is to say, to oust appellants so as to restore the lands to the possession of appellees. It is plain that this is not the office of an injunction. Entry and possession of the lands by appellants and all alleged wrongful acts and proceedings preliminary thereto and in aid thereof had been consummated long before suit was brought and preventive relief by injunction, consequently, had ceased to be appropriate.

Whitehead v. *Shattuck*, 138 U. S. 146, was a suit in equity to quiet title to real property. Plaintiff was the owner in fee, holding title as trustee. Defendants claimed title and were in possession, openly and adversely. Plaintiff averred that defendants' claim of title was made in fraud of his rights; that the patent under which they claimed was fraudulently made, the land not being subject to entry and patent. Upon these facts, this Court held that plaintiff had an adequate remedy at law, and that a suit in equity could not be sustained, saying (page 151):

". . . where an action is simply for the recovery and possession of specific real or personal property, or for the recovery of a money judgment, the action is one at law. An action for the recovery of real property, including damages for withholding it, has always been of that class. The right which in this case the plaintiff wishes to assert is his title to certain real property; the remedy which he wishes to obtain is its possession and enjoyment; and in a

contest over the title both parties have a constitutional right to call for a jury."

In *Lacassagne* v. *Chapuis,* 144 U. S. 119, 124, this court said:

"The plaintiff was out of possession when he instituted this suit; and by the prayer of this bill he attempts to regain possession by means of the injunction asked for. In other words, the effort is to restore the plaintiff, by injunction, to rights of which he had been deprived. The function of an injunction is to afford preventive relief, not to redress alleged wrongs which have been committed already. An injunction will not be used to take property out of the possession of one party and put it into that of another. 1 High on Injunctions, 2d ed. § 355."

To the same effect is *United States* v. *Wilson,* 118 U. S. 86, 89; *Black* v. *Jackson,* 177 U. S. 349, 361. In the latter case the rule was applied, notwithstanding the financial inability of the defendant to respond in damages.

The two cases cited by the court below are not in point. In *Hopkins* v. *Clemson College, supra,* plaintiff sued for damages caused by erection of a dike on one side of a river, which had the effect of submerging his lands lying wholly upon the other side. The injury was "continuous from day to day and year to year." The prayer was for damages, and abatement and removal of the dike. The injury was in the nature of a continuing trespass; possession was neither involved nor sought.

In *United States Freehold Land & Emigration Co.* v. *Gallegos, supra,* the bill was to enjoin the diversion of water to the injury of complainant's lands, constituting a continuing trespass. The ownership or possession of the lands was not in controversy.

The present case is entirely different. Here the purpose of the suit is to eject appellants from lands which for five months had been and still were in their exclusive

possession, under claim of right and in pursuance of a statute which gives color of title notwithstanding the challenge to its constitutionality. See *Doe on dem. of Trustees, etc.* v. *Newbern Academy,* 9 N. Car. 233. That challenge does not require resort to a suit in equity. It will be open for determination in an action at law which is the appropriate remedy.

The decree below must be reversed and the cause remanded with instructions to dismiss the bill, but without prejudice to an action at law in a court of competent jurisdiction.

Section 274a of the Judicial Code, U. S. C., Title 28, § 397, and Rule 22 of the Equity Rules, 226 U. S., appendix, 6, contemplate that where what is really an action at law is erroneously begun as a suit in equity, the same may be transferred to the law side of the court and after appropriate amendments may be prosecuted to a judgment as if originally begun on the law side. See *Liberty Oil Co.* v. *Condon National Bank,* 260 U. S. 235; *Liberty Warehouse Co.* v. *Grannis,* 273 U. S. 70, 76; *Twist* v. *Prairie Oil Co.,* 274 U. S. 684, 689, 692. But both the statute and the equity rule refer, and can only refer, to cases of which the court would have jurisdiction if they were brought on its law side. This is not such a case. The parties are citizens, not of different States, but of the same State. And if the plaintiffs were suing at law in ejectment their complaint, if confined to an orderly statement of such a cause of action, without anticipating possible defenses, would not present a case arising under the Constitution, or a treaty or law of the United States. *Taylor* v. *Anderson,* 234 U. S. 74. Thus the case, if brought as an action at law, would be one of which a federal district court would not have jurisdiction. In this situation no other course is open than to direct that the bill be dismissed and leave the plaintiffs free to sue in a state court, if they be so advised.

Decree reversed.

DECISIONS PER CURIAM, FROM OCTOBER 7, 1929, TO AND INCLUDING JANUARY 27, 1930.[1]

No. 578. MACALLEN CO. *v.* MASSACHUSETTS. Petition submitted June 20, 1929. Decided October 14, 1929. *Per Curiam:* The motions presented on behalf of the American Bankers Association and on behalf of the Massachusetts National Bank Association for leave to file briefs, as *amici curiae,* in support of the petition for a rehearing in this cause, are granted. The Court has considered these two briefs, and also the four briefs heretofore permitted to be filed by the States of California, Washington, Oregon, and New York, as friends of the Court. After consideration of these briefs, and of the petition for a rehearing of this cause filed by the State of Massachusetts, such petition for a rehearing is denied. *Messrs. Joseph E. Warner,* Attorney General, and *James S. Eastham* and *R. Ammi Cutter,* Assistant Attorneys General, for the Commonwealth of Massachusetts. For the opinion of this Court in the cause, see 279 U. S. 620.

No. 21, original. EX PARTE NORTHERN PACIFIC R. CO. ET AL. Motion submitted October 7, 1929. Motion granted October 14, 1929. *Per Curiam:* The motion for leave to file a petition for a writ of mandamus, and the motion for leave to amend and supplement such petition, are granted.

A rule is directed to issue against the respondents, returnable on the first motion day following a period of 30

[1] For decisions on applications for certiorari, see *post,* pp. 537, 553.

days from this date, directing them to show cause why a writ of mandamus should not issue in this cause. *Messrs. Bruce Scott, H. H. Field, F. G. Dorety, M. S. Gunn,* and *Dennis F. Lyons* for petitioners.

No. 18, original. NEW JERSEY *v.* CITY OF NEW YORK. Motion submitted October 7, 1929. Motion granted October 14, 1929. The motion for the appointment of a special master is granted; and the Honorable Edward K. Campbell is appointed special master in this cause, with power to summon witnesses, issue subpœnas, and to take such testimony as may be introduced and such as he may desire to call. The master is directed to make findings of fact and conclusions of law, and to submit the same to this Court with all convenient speed, together with his recommendations for a decree. The findings, conclusions, and recommendations of the master shall be subject to consideration, revision, or approval by the Court. *Messrs. Duane E. Minard* and *Wm. A. Stevens* for complainant. *Mr. Arthur J. W. Hilley* for defendant.

No. 190. DAVID *v.* HUBBARD, TRUSTEE IN BANKRUPTCY; and

No. 191. SAME *v.* SAME. On petitions for writs of certiorari to the Circuit Court of Appeals for the Third Circuit. Motion submitted October 7, 1929. Decided October 14, 1929. *Per Curiam:* The motions for leave to proceed further herein *in forma pauperis* are denied. The Court has examined the unprinted records submitted in support of the petitions for certiorari and finds that the attacks upon the action of the court below are without any substantial merit. For this reason the petitions for writs of certiorari are denied, and the clerk is directed to

enter the usual order with respect to the payment of costs already incurred, as provided in the order of October 29, 1926. *Mr. Elwood G. Hubert* for petitioner. No appearance for respondent. Reported below: 33 F. (2d) 748.

No. 388. BROWN ET AL. *v.* CALIFORNIA. On petition for writ of certiorari to the Supreme Court of California. Motion submitted October 7, 1929. Decided October 14, 1929. *Per Curiam:* The Court is of opinion that the arguments of petitioners upon the action of the state court in allowing a juror to sit and in denying a writ of error *coram nobis* are frivolous. For this reason, the motion for leave to proceed further herein *in forma pauperis,* and the petition for a writ of certiorari, are severally denied.

The clerk is directed to enter the usual order for the payment of costs already incurred, as provided in the order of October 29, 1926. *Messrs. George C. Faulkner* and *J. J. Henderson* for petitioners. *Mr. U. S. Webb,* Attorney General of California, for respondent. Reported below: 277 Pac. 320.

No. 329. GOOD SPRINGS ANCHOR CO. *v.* UNITED STATES. On writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit. Petition submitted October 7, 1929. Decided October 21, 1929. *Per Curiam:* The petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted. The judgment of the Circuit Court of Appeals is reversed and the cause is remanded to the District Court of the United States for the Southern District of California with directions to dismiss the suit. *Mr. Ralph W. Smith* for petitioner. *Solicitor General Hughes* and *Mr. Sewall Key* for the United States. Reported below: 32 F. (2d) 1019.

No. 90. HARRINGTON ET AL. *v.* SLOAN. Appeal from the Supreme Court of Nebraska. Jurisdictional statement submitted October 14, 1929. Decided October 28, 1929. *Per Curiam:* The appeal is dismissed and certiorari is denied for the want of a substantial federal question on the authority of *Shulthis* v. *McDougal,* 225 U. S. 561, 569; *Hull* v. *Burr,* 234 U. S. 712, 720; *Norton* v. *Whiteside,* 239 U. S. 144, 147. *Messrs. Wymer Dressler* and *Robert D. Neely* for appellants. *Messrs. J. A. C. Kennedy* and *Charles L. McLaughlin* for appellee. Reported below: 223 N. W. 663.

No. 119. GANDY ET AL. *v.* LOUISIANA OIL REFINING CO. ET AL. Appeal from the Supreme Court of Louisiana. Jurisdictional statement submitted October 14, 1929. Decided October 28, 1929. *Per Curiam:* The appeal is dismissed and certiorari is denied for the want of a substantial federal question on the authority of *Shulthis* v. *McDougal,* 225 U. S. 561, 569; *Hull* v. *Burr,* 234 U. S. 712, 720; *Norton* v. *Whiteside,* 239 U. S. 144, 147. *Mr. E. H. Randolph* for appellants. *Mr. Elias Goldstein* for appellees. Reported below: 168 La. 37.

No. 173. CENTRAL NAT'L BANK *v.* LYNN. Appeal from the Superior Court for County of Essex, Massachusetts. Jurisdictional statement submitted October 14, 1929. Decided October 28, 1929. *Per Curiam:* The appeal is dismissed and certiorari is denied for the want of a substantial federal question on the authority of *Shulthis* v. *McDougal,* 225 U. S. 561, 569; *Hull* v. *Burr,* 234 U. S. 712, 720; *Norton* v. *Whiteside,* 239 U. S. 144, 147. *Mr. Thomas Hunt* for appellant. *Mr. Wm. Harold Hitchcock* for appellee.

No. 183. TREMONT LUMBER CO. *v.* POLICE JURY OF THE PARISH OF WINN ET AL. Appeal from the Supreme Court of Louisiana. Jurisdictional statement submitted October 14, 1929. Decided October 28, 1929. *Per Curiam:* The appeal is dismissed and certiorari is denied for the want of a substantial federal question on the authority of *Shulthis* v. *McDougal,* 225 U. S. 561, 569; *Hull* v. *Burr,* 234 U. S. 712, 720; *Norton* v. *Whiteside,* 239 U. S. 144, 147. *Mr. John C. Theus* for appellant. No appearance for appellees. Reported below: 168 La. 597.

No. 199. WORKMAN *v.* BOONE ET AL. Appeal from the Supreme Court of California. Jurisdictional statement submitted October 14, 1929. Decided October 28, 1929. *Per Curiam:* The appeal is dismissed and certiorari is denied for the want of a substantial federal question on the authority of *Shulthis* v. *McDougal,* 225 U. S. 561, 569; *Hull* v. *Burr,* 234 U. S. 712, 720; *Norton* v. *Whiteside,* 239 U. S. 144, 147. *Messrs. Robert M. Clarke, Don G. Bowker, Arthur R. Smiley, Alexander T. Sokolow,* and *Henry S. Mackay, Jr.,* for appellant. *Mr. David R. Faries* for appellees. Reported below: 274 Pac. 62; 273 Pac. 819.

No. 200. WORKMAN ET AL. *v.* BOONE ET AL. Appeal from the Supreme Court of California. Jurisdictional statement submitted October 14, 1929. Decided October 28, 1929. *Per Curiam:* The appeal is dismissed and certiorari is denied for the want of a substantial federal question on the authority of *Shulthis* v. *McDougal,* 225 U. S. 561, 569; *Hull* v. *Burr,* 234 U. S. 712, 720; *Norton* v. *Whiteside,* 239 U. S. 144, 147. *Mr. Robert M. Clarke, Don G. Bowker, Arthur R. Smiley, Alexander T. Sokolow,*

and *Henry S. Mackay, Jr.*, for appellants. *Mr. David R. Faries* for appellees. Reported below: 274 Pac. 62; 273 Pac. 819.

No. 294. MUSELIN *v.* PENNSYLVANIA;

No. 295. ZIMA *v.* SAME; and

No. 296. RESETAR *v.* SAME. Appeals from the Supreme Court of Pennsylvania. Jurisdictional statements submitted October 14, 1929. Decided October 28, 1929. *Per Curiam:* The appeals are dismissed and certiorari is denied for the want of a substantial federal question on the authority of *Shulthis* v. *McDougal,* 225 U. S. 561, 569; *Hull* v. *Burr,* 234 U. S. 712, 720; *Norton* v. *Whiteside,* 239 U. S. 144, 147. *Mr. Thomas M. Henry* for appellants. *Mr. John G. Frazer* for appellee. 295 Pa. 311.

No. 343. DIANISH *v.* VILLAGE OF BROADVIEW. Appeal from the Supreme Court of Illinois. Jurisdictional statement submitted October 14, 1929. Decided October 28, 1929. *Per Curiam:* The appeal is dismissed and certiorari is denied for the want of a substantial federal question on the authority of *Shulthis* v. *McDougal,* 225 U. S. 561, 569; *Hull* v. *Burr,* 234 U. S. 712, 720; *Norton* v. *Whiteside,* 239 U. S. 144, 147. *Messrs. Stuart E. Knappen* and *Meyer Abrams* for appellants. *Messrs. James McKeag* and *William A. Morrow* for appellee. Reported below: 335 Ill. 299.

No. 206. ALLEN & REED, INC. *v.* PRESBREY ET AL. Appeal from the Superior Court for Counties of Providence and Bristol, Rhode Island. Jurisdictional statement submitted October 14, 1929. Decided October 28, 1929. *Per Curiam:* It appearing that this case has be-

come moot, the appeal is dismissed and the cause is remanded to the Superior Court for the Counties of Providence and Bristol of the State of Rhode Island in order that that court may take such further proceedings as may be appropriate in the premises. This is done upon the authority of *Mills* v. *Green,* 159 U. S. 651; *American Book Co.* v. *Kansas,* 193 U. S. 49, 51; and *Brownlow* v. *Schwartz,* 261 U. S. 216. *Mr. William W. Moss* for appellant. *Mr. Elmer S. Chace* for appellees. Reported below: 144 Atl. 888.

No. 169. Booth et al. *v.* Clapp et al. Appeal from the Supreme Court of Ohio. Jurisdictional statement submitted October 14, 1929. Decided October 28, 1929. *Per Curiam:* The motion for leave to proceed further herein *in forma pauperis* is denied. The appeal is dismissed and certiorari is denied for the want of a substantial federal question on the authority of *Shulthis* v. *McDougal,* 225 U. S. 561, 569; *Hull* v. *Burr,* 234 U. S. 712, 720; *Norton* v. *Whiteside,* 239 U. S. 144, 147. The costs already incurred herein by direction of the Court shall be paid by the clerk as provided in the order of October 29, 1926. *Mr. Jonathan Taylor* for appellants. No appearance for appellees. Reported below: 120 Ohio St. 91.

No. 115. Jones *v.* Consolidated Wagon & Machine Co. Appeal from the District Court for the District of Idaho. Jurisdictional statement submitted October 14, 1929. Decided October 28, 1929. *Per Curiam:* The appeal is dismissed for the want of jurisdiction on the authority of § 238 of the Judicial Code, as amended by the act of February 13, 1925, c. 229, § 1, 43 Stat. 938. *Mr. Wilson S. Wiley* for appellant. *Mr. Bernard J. Stewart* for appellee. Reported below: 31 F. (2d) 383.

No. 341. VINYARD ET AL. *v.* NORTH SIDE CANAL CO. ET AL. Appeal from the Supreme Court of Idaho. Jurisdictional statement submitted October 14, 1929. Decided October 28, 1929. *Per Curiam:* The appeal is dismissed and certiorari is denied for the want of a properly presented substantial federal question on the authority of *St. Louis & San Francisco R. Co. v. Shephard,* 240 U. S. 240; *Jett Bros. Distilling Co.* v. *City of Carrollton,* 252 U. S. 1; *Consolidated Turnpike Co.* v. *Norfolk & Ocean View Ry.,* 228 U. S. 326. *Mr. James B. Eldridge* for appellants. *Mr. E. A. Walters* for appellees. Reported below: 274 Pac. 1069.

No. 349. GARYSBURG MFG. CO. *v.* BOARD OF COMMISSIONERS ET AL. Appeal from the Supreme Court of North Carolina. Jurisdictional statement submitted October 14, 1929. Decided October 28, 1929. *Per Curiam:* The appeal is dismissed for the reason that the judgment of the state court sought here to be reviewed was based on a non-federal ground adequate to support it. *Bilby* v. *Stewart,* 246 U. S. 255, 257; *Farson Son & Co.* v. *Bird,* 248 U. S. 268, 271. *Messrs. George Roundtree* and *F. S. Spruill* for appellant. No appearance for appellees. Reported below: 196 N. C. 284.

No. 392. CALIFORNIA DELTA FARMS, INC. *v.* CHINESE AMERICAN FARMS, INC. Appeal from the Supreme Court of California. Jurisdictional statement submitted October 14, 1929. Decided October 28, 1929. *Per Curiam:* The appeal is dismissed on the authority of § 237 (a) of the Judicial Code, as amended by the act of Feb. 13, 1925 (43 Stat. 936, 937), for lack of jurisdiction, on the ground that the decree sought to be reviewed is not a

final one. *Haseltine* v. *Central Bank of Springfield,* 183 U. S. 130, 131; *Schlosser* v. *Hemphill,* 198 U. S. 173, 175; *Arnold* v. *United States for the use of Guimarin & Co.,* 263 U. S. 427, 434. *Mr. F. Eldred Boland* for appellant. *Mr. Albert H. Elliott* for appellee. Reported below: 278 Pac. 227; see also 278 Pac. 232, 268 Pac. 1050, and 255 Pac. 1097.

No. 70. KING *v.* UNITED STATES. On writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit. Argued October 23, 1929. Decided October 28, 1929. *Per Curiam:* Judgment affirmed on the authority of *Albrecht* v. *United States,* 273 U. S. 1. *Messrs. Clarence Wood, S. X. Christensen,* and *Leon J. Dugan* were on the brief for petitioner. *Assistant Attorney General Sisson,* with whom *Solicitor General Hughes, Assistant Attorney General Luhring, Mr. George C. Butte,* Special Assistant to the Attorney General, and *Mr. Harry S. Ridgely* were on the brief, for the United States. Reported below: 31 F. (2d) 17.

No. 18. SUTTER ET AL. *v.* MIDLAND VALLEY R. Co. On writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit. Argued October 24, 1929. Decided October 28, 1929. *Per Curiam:* The writ of certiorari herein [278 U. S. 597] is dismissed as improvidently granted, in that it now appears that the petition for certiorari did not adequately and fairly disclose the questions involved and the grounds upon which the state court rested its decision. See *Davis* v. *Currie,* 266 U. S. 182. *Mr. Harry William Hart,* with whom *Messrs. Charles G. Yankey, John Gleason, Glenn Porter, Enos E. Hook,* and *W. G. McDonald* were on the brief, for petitioners. *Messrs. O. E. Swan* and *James D. Gibson* were on the brief for respondent. Reported below: 28 F. (2d) 163.

No. 403. MOE ET AL *v.* ABERG ET AL., TRUSTEES. Appeal from the Supreme Court of Wisconsin. Jurisdictional statement submitted October 28, 1929. Decided November 4, 1929. *Per Curiam:* The appeal herein is dismissed, and certiorari is denied, for the want of a question adequate to support the jurisdiction of this Court. *Messrs. R. M. Rieser* and *H. L. Butler* for appellants. *Messrs. John W. Reynolds, Franklin E. Bump, John B. Sanborn,* and *Chauncey E. Blake* for appellees. Reported below: 224 N. W. 132.

No. 465. HILL *v.* UNITED STATES. On petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit. Motion submitted November 4, 1929. Decided November 25, 1929. *Per Curiam:* The motion for leave to proceed further herein *in forma pauperis* is denied, for the reason that the Court, upon examination of the unprinted record herein submitted, finds no ground upon which a writ of certiorari can be issued. The petition for certiorari is therefore also denied. The Clerk is directed to pay the costs already incurred in this cause in the manner provided in the order of October 29, 1926. *Mr. John J. Sullivan* for petitioner. No appearance for the United States. Reported below: 33 F. (2d) 489.

No. 472. HALLAM *v.* GRANT. On petition for writ of certiorari to the Supreme Court of Oregon. Motion submitted November 4, 1929. Decided November 25, 1929. *Per Curiam:* The motion for leave to proceed further herein *in forma pauperis* is denied, for the reason that the Court, upon examination of the unprinted record herein submitted, finds that there is no substantial federal question upon which a writ of certiorari can be issued. The petition for a writ of certiorari is therefore also denied.

The costs already incurred herein shall be paid by the Clerk as provided in the order of October 29, 1926. *Mr. William H. Hallam, pro se,* for petitioner. No appearance for respondent. Reported below: 276 Pac. 687.

No. —, original. EX PARTE ATWOOD ET AL. Motion submitted November 4, 1929. Decided November 25, 1929. The motion for leave to file petition for writ of mandamus is denied. *Mr. Lyman K. Clark, Jr.,* for petitioners.

No. —, original. EX PARTE UNITED STATES EX REL. SENITHA. Motion submitted November 25, 1929. Decided December 2, 1929. The motion for leave to file a petition for a writ of mandamus is denied. *Mr. Curley C. Hoffpauir* for petitioner.

No. —, original. EX PARTE RISHEL. Motion submitted November 25, 1929. Decided December 2, 1929. The motions for leave to file a petition for a writ of mandamus and for leave to proceed *in forma pauperis* are denied without prejudice. *Minnie Rishel, pro se,* for petitioner.

No. 13, original. CONNECTICUT *v.* MASSACHUSETTS. Motion submitted November 25, 1929. Decided December 2, 1929. The motion for the appointment of a special master in this case is granted; and Charles W. Bunn, Esq., of St. Paul, State of Minnesota, is appointed special master in this cause, with power to summon witnesses, issue subpœnas, and to take such testimony as may be introduced and such as he may deem necessary to call. The master is directed to make findings of fact and conclusions of law, and to submit the same to this Court with

all convenient speed, together with his recommendations for a decree. The findings, conclusions, and recommendations of the special master shall be subject to consideration, revision, or approval by the Court. *Mr. Bentley W. Warren* submitted the motion for defendant.

No. 41. TYSON *v.* HARTLEY, GOVERNOR, ET AL. Appeal from the U. S. Dist. Ct., W. D. of Washington. Argued December 2, 1929. Decided December 3, 1929. Dismissed for want of jurisdiction. *Mr. Thomas Mannix* submitted for appellant. *Mr. Edward P. Donnelly,* Assistant Attorney General of Washington, with whom *Mr. John H. Dunbar,* Attorney General, was on the brief, for appellees. *Mr. J. M. Devers,* Assistant Attorney General of Oregon, with whom *Mr. I. H. Van Winkle,* Attorney General, was on the brief, for the State of Oregon, as *amicus curiae,* by special leave of Court.

No. 247. TROCHE *v.* CALIFORNIA. Appeal from the Supreme Court of California. Argued December 2, 1929. Decided December 9, 1929. *Per Curiam:* The appeal is dismissed for the want of a substantial federal question, on the authority of *Shulthis* v. *McDougal,* 225 U. S. 561, 569; *Hull* v. *Burr,* 234 U. S. 712, 720; *Norton* v. *Whiteside,* 239 U. S. 144, 147. Treating the papers whereon the appeal was allowed as a petition for certiorari, as required by § 237 (c) of the Judicial Code, as amended by the act of February 13, 1925 (c. 229, 43 Stat. 936, 938), the certiorari is denied. *Mr. Ray T. Coughlin,* with whom *Mr. Roland Becsey* was on the brief, for appellant. *Messrs. U. S. Webb,* Attorney General of California, and *William F. Cleary,* Deputy Attorney General, were on the brief for appellee. Reported below: 273 Pac. 767.

No. 34. BLIND ET AL. *v.* BROCKMAN ET AL. Appeal from and in error to the Supreme Court of Missouri. Argued December 2, 1929. Decided December 9, 1929. *Per Curiam:* Judgment affirmed, on the authority of *Adams* v. *Milwaukee,* 288 U. S. 572, 581, 583; *Patsone* v. *Pennsylvania,* 232 U. S. 138, 144; *Central Lumber Company* v. *South Dakota,* 226 U. S. 157, 160. *Mr. Ernest F. Oakley, Jr.,* with whom *Messrs. Edward G. Davidson* and *Lena Frank Oakley* were on the brief, for Blind et al. *Messrs. Julius T. Muench* and *Oliver Senti* were on the brief for Brockman et al. 12 S. W. (2d) 742.

No. 40. GREENWAY APARTMENT CO. *v.* THE CONVENTION OF THE PROTESTANT EPISCOPAL CHURCH ET AL. Appeal from the Baltimore City Court, State of Maryland. Argued December 3, 1929. Decided December 9, 1929. *Per Curiam:* The appeal is dismissed for the want of a properly presented federal question, on the authority of *Jett Bros. Distilling Company* v. *City of Carrollton,* 252 U. S. 1. Treating the papers whereon the appeal was allowed as a petition for certiorari, as required by § 237 (c) of the Judicial Code, as amended by the act of February 13, 1925 (c. 229, 43 Stat. 936, 938), the certiorari is denied. *Mr. Isaac Lobe Strauss* for appellant. *Messrs. Charles F. Harley* and *Edward F. Bassett,* with whom *Messrs. Henry D. Harlan, Edw. Guest Gibson,* and *Burdette B. Webster* were on the brief, for appellees.

No. 43. LOUISIANA GREYHOUND CLUB, INC. *v.* CLANCY, SHERIFF, ET AL. Appeal from the Supreme Court of Louisiana. Argued December 4, 1929. Decided December 9, 1929. *Per Curiam:* Decree affirmed, on the authority of *Smith* v. *Commonwealth of Kentucky,* 275

U. S. 509, and cases there cited. *Mr. E. Howard McCaleb* for appellant. *Mr. Eugie V. Parham,* with whom *Mr. Edward Rightor* was on the brief, for appellees. Reported below: 119 So. 532, 120 So. 295.

No. 46. ANGLO & LONDON-PARIS NAT'L BANK *v.* CONSOLIDATED NAT'L BANK. On writ of certiorari to the Superior Court of Arizona in and for the County of Pima, and to the Supreme Court of Arizona. Argued December 4, 1929. Decided December 9, 1929. *Per Curiam:* The writ of certiorari herein is dismissed as improvidently granted. *Mr. Frederic R. Coudert,* with whom *Mr. Mahlon B. Doing* was on the brief, for petitioner. *Mr. John W. Davis,* with whom *Mr. Samuel L. Kingan* was on the brief, for respondent. Reported below: 269 Pac. 68.

No. 51. GULF, MOBILE & NORTHERN R. Co. *v.* WILLIAMS. On writ of certiorari to the Supreme Court of Alabama. Argued December 5, 1929. Decided December 5, 1929. Writ of certiorari dismissed as improvidently granted. *Mr. J. G. Hamilton,* with whom *Mr. J. N. Flowers* was on the brief, for petitioner. *Messrs. B. F. McMillan, Jr.,* and *S. M. Johnston,* with whom *Messrs. Gregory L. Smith* and *Harry H. Smith* were on the brief, for respondent. Reported below: 119 So. 212.

No. 52. LUCAS, COMMISSIONER OF INTERNAL REVENUE, *v.* HOWARD. On writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit. Argued December 5, 1929. Decided December 9, 1929. *Per Curiam:* Judgment reversed upon the authority of *Metcalf & Eddy* v. *Mitchell,* 269 U. S. 514. *Assistant Attorney General Youngquist,* with whom *Solicitor General Hughes, Mr. J. Louis Mon-*

arch and *Helen R. Carloss,* Special Assistants to the Attorney General, and *Messrs. Clarence M. Charest* and *Shelby S. Faulkner* were on the brief, for petitioner. *Mr. W. J. Howard, pro se,* for respondent. Reported below: 29 F. (2d) 895.

No. 58. First Addition to the Rattle Snake Drainage District et al. *v.* Bodeman et al. Appeal from the Supreme Court of Wisconsin. Argued December 6, 1929. Decided December 9, 1929. *Per Curiam:* The appeal is dismissed for the want of a substantial federal question, on the authority of *Shulthis* v. *McDougal,* 225 U. S. 561, 569; *Hull* v. *Burr,* 234 U. S. 712, 720; *Norton* v. *Whiteside,* 239 U. S. 144, 147. Treating the papers whereon the appeal was allowed as a petition for certiorari, as required by § 237 (c) of the Judicial Code, as amended by the act of February 13, 1925 (c. 229, 43 Stat. 936, 938), the certiorari is denied. *Messrs. Charles E. Buell, Frank Lucas, H. L. Butler,* and *R. M. Rieser* submitted for appellants. *Mr. Frank W. Hall,* with whom *Messrs. Wm. R. Bagley, John F. Baker,* and *Laurence W. Hall* were on the brief, for appellees. 197 Wis. 261.

No. 415. La Plain et al. *v.* Allard. Appeal from the Supreme Court of Washington. Jurisdictional statement submitted December 2, 1929. Decided December 9, 1929. *Per Curiam:* The appeal herein is dismissed on the authority of § 237 (a) of the Judicial Code, as amended by the act of February 13, 1925 (c. 229, 43 Stat. 936, 937), for the want of jurisdiction. Treating the papers whereon the appeal was allowed as a petition for certiorari, as required by § 237 (c) of the Judicial Code, the certiorari is denied for the want of a substantial federal question, on the authority of *Shulthis* v. *McDougal,*

225 U. S. 561, 569; *Hull* v. *Burr*, 234 U. S. 712, 720; *Norton* v. *Whiteside*, 239 U. S. 144, 147. *Messrs. Charles C. Heltman* and *Charles F. Consaul* for appellants. *Mr. W. B. Stratton* for appellee. Reported below: 277 Pac. 843, 266 Pac. 688.

No. 429. ORTEGA *v.* MAGMA COPPER CO. Appeal from the District Court for the District of Arizona. Jurisdictional statement submitted December 2, 1929. Decided December 9, 1929. *Per Curiam:* Appeal dismissed for the lack of jurisdiction, upon the authority of § 238 of the Judicial Code, as amended by the act of February 13, 1925 (c. 229, 43 Stat. 936, 938). *Mr. Norman B. Landreau* for appellant. No appearance for appellee.

No. 435. THE STATE OF NORTH DAKOTA, DOING BUSINESS AS THE BANK OF NORTH DAKOTA *v.* OLSON, COLLECTOR OF INTERNAL REVENUE. Appeal from the Circuit Court of Appeals for the Eighth Circuit. Jurisdictional statement submitted December 2, 1929. Decided December 9, 1929. *Per Curiam:* The appeal herein is dismissed for the lack of jurisdiction, upon the authority of § 240 (b) of the Judicial Code, as amended by the act of February 13, 1925 (43 Stat. 936, 939). *Mr. James Morris* for appellant. *Solicitor General Hughes* and *Messrs. Seth W. Richardson, Sewall Key,* and *Morton P. Fisher* for appellee. Reported below: 33 F. (2d) 848.

No. 17, original. NEW JERSEY *v.* STATE OF NEW YORK AND CITY OF NEW YORK. Motion submitted December 9, 1929. Decided January 6, 1930. The motion of the State of Pennsylvania for leave to intervene in this cause is granted, upon the condition that the State of Pennsylvania shall file a statement of her interests in this cause

and of the relief, if any, which she seeks. *Mr. Owen J. Roberts* for the State of Pennsylvania. *Messrs. Duane E. Minard* and *Wm. A. Stevens* for the State of New Jersey. *Mr. Paul Shipman Andrews,* in behalf of *Mr. Hamilton Ward,* Attorney General, for the State of New York. *Messrs. Arthur J. W. Hilly* and *J. Joseph Lilly* for the City of New York.

No. 19, original. NEW JERSEY *v.* DELAWARE. Motion submitted December 9, 1929. Decided January 6, 1930. The motion for the appointment of a special master in this case is granted; and William L. Rawls, Esquire, of Baltimore, State of Maryland, is appointed special master in this cause with the power to summon witnesses, issue subpœnas, and to take such testimony as may be introduced and such as he may deem necessary to call. The master is directed to make findings of fact and conclusions of law, and to submit the same to this Court with all convenient speed, together with his recommendations for a decree. The findings, conclusions, and recommendations of the special master shall be subject to consideration, revision, or approval by the Court. *Mr. Duane E. Minard* submitted the motion for the State of New Jersey. *Mr. Reuben Satterthwaite, Jr.,* for the State of Delaware.

No. 65. IOWA MOTOR VEHICLE ASSOCIATION ET AL. *v.* BOARD OF RAILROAD COMMISSIONERS OF IOWA ET AL.; and

No. 69. HAWKEYE STAGES, INC. *v.* SAME. Appeals from the Supreme Court of Iowa. Argued December 9, 1929. Decided January 6, 1930. *Per Curiam:* Decrees affirmed upon the authority of *Bekins Van Lines, Inc.* v. *Riley, ante,* p. 80. *Mr. Casper Schenk,* with whom *Messrs. C. S. Bradshaw, John A. Senneff, W. L. Bliss,* and *H. S. Hunn* were on the brief, for Iowa Motor Vehicle Association. *Messrs. John J. Halloran* and *A. D. Pugh* were on

the brief for Hawkeye Stages, Inc. *Messrs. John Fletcher,* Attorney General of Iowa, *Maxwell A. O'Brien,* Assistant Attorney General, *J. H. Henderson,* Commerce Counsel of Iowa, and *Stephen Robinson,* Assistant Commerce Counsel, were on the brief for the Board of Railroad Commissioners of Iowa *et al.* Reported below: 207 Iowa 461.

No. —, original. Ex parte Rhode Island et al. Motion submitted January 6, 1930. Decided January 8, 1930. The motion for leave to file a petition for writ of mandamus is denied. *Mr. Sigmund W. Fischer, Jr.,* for petitioner in support of the motion. *Solicitor General Hughes* for respondent in opposition thereto.

No. —, original. Ex parte Bradford. Motion submitted January 6, 1930. Decided January 13, 1930. The motion for leave to file petition for writ of mandamus is denied. *Mr. Otto Gresham* for petitioner.

No. 21, original. Ex parte Northern Pacific R. Co. et al. Motion submitted January 6, 1930. Decided January 13, 1930. On consideration of the motion for the issuance of a formal writ of mandamus herein and of the supplement to such motion. It is ordered that a formal and peremptory writ of mandamus issue in this cause, conformable to the rule to show cause which was made absolute by this Court's opinion of December 2, 1929, and that there be included in such formal writ a direction requiring the defendant, Bourquin, to vacate so much of his order of December 14, 1929, as assumes to appoint a Special Master to take testimony and assumes to fix a time for the final hearing of the cause before the statutory court of three judges. *Mr. Dennis F. Lyons* submitted the motion for petitioners. See *ante,* p. 142.

No. 545. HUNTER *v.* BAASH-ROSS TOOL CO. ET AL. On petition for writ of certiorari to the Supreme Court of California. Motion submitted January 6, 1930. Decided January 13, 1930. *Per Curiam:* The motion for leave to proceed further herein *in forma pauperis* is denied, for the reason that the Court, upon examination of the unprinted record herein submitted, finds that there is no properly presented substantial federal question. The petition for writ of certiorari is therefore also denied. The costs already incurred herein shall be paid by the Clerk as provided in the order of October 29, 1926. *Mr. Charles W. Hunter, pro se.* No appearance for respondents.

No. 89. TEXAS & PACIFIC R. CO. *v.* GUIDRY, ADMINISTRATRIX. On writ of certiorari to the Court of Civil Appeals, Fifth Supreme Judicial District, State of Texas. Argued January 15, 1930. Decided January 20, 1930. *Per Curiam:* Judgment affirmed. *Western & Atlantic R. R.* v. *Hughes, Administratrix,* 278 U. S. 496, 498. *Mr. J. H. T. Bibb,* with whom *Messrs. T. D. Gresham* and *R. S. Shapard* were on the brief, for petitioner. *Messrs. S. P. Jones, Franklin Jones,* and *P. G. Henderson* were on the brief for respondent. Reported below: 9 S. W. (2d) 284.

No. 470. YAMHILL ELECTRIC CO. *v.* MCMINNVILLE ET AL. Appeal from the Supreme Court of Oregon. Jurisdictional statement submitted January 13, 1930. Decided January 20, 1930. *Per Curiam:* The appeal is dismissed for the want of a substantial federal question. *Shulthis* v. *McDougal,* 225 U. S. 561, 569; *Hull* v. *Burr,* 234 U. S. 712, 720; *Norton* v. *Whiteside,* 239 U. S. 144, 147. Treating the papers whereon the appeal was allowed as a petition for certiorari, as required by § 237 (c) of the Judicial Code, as amended by the Act of February

13, 1925 (c. 229, 43 Stat. 936, 938), certiorari is denied. *Mr. Walter L. Tooze, Jr.*, for appellant. *Mr. John P. Kavanaugh* for appellees. Reported below: 280 Pac. 504.

No. 475. SOUTHERN CALIFORNIA EDISON CO. *v.* RAILROAD COMMISSION OF CALIFORNIA ET AL. Appeal from the Supreme Court of California. Jurisdictional statement submitted January 13, 1930. Decided January 20, 1930. *Per Curiam:* The appeal is dismissed on the authority of § 237 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 936, 937), for lack of jurisdiction on the ground that the judgment sought to be reviewed is not a final one. *Grays Harbor Logging Company* v. *Coats-Fordney Logging Company,* 243 U. S. 251. Treating the papers whereon the appeal was allowed as a petition for certiorari, as required by § 237 (c) of the Judicial Code, as amended by the Act of February 13, 1925 (c. 229, 43 Stat. 936, 938), certiorari is denied. *Messrs. W. C. Mullendore* and *Roy V. Reppy* for appellant. *Messrs. Erwin P. Werner, Arthur T. George,* and *Wm. B. Mathews* for appellees.

No. 13, original. CONNECTICUT *v.* MASSACHUSETTS. Argued January 20, 1930. Decided January 20, 1930. On consideration of the motions of the complainant to strike out certain parts of the answer of the defendant and to dismiss answer of the defendant, and of the argument of counsel thereupon had,

It is now here ordered by this Court that the said motions be, and they are hereby, denied.

And it is further ordered by this Court that the complainant file its reply to the answer of the defendant within one week from this date. *Messrs. Benedict M. Holden* and *Ernest L. Averill* for complainant. *Mr. Bentley W. Warren* for defendant.

No. 245. TEXAS EX REL. ISENSEE ET AL. *v.* SIMS ET AL. Appeal from the Supreme Court of Texas. Argued January 23, 24, 1930. Decided January 24, 1930. Dismissed for want of jurisdiction. *Mr. M. G. Eckhardt, Jr.*, with whom *Messrs. Barry Mohun, Edward R. Kleberg, John C. North, B. D. Tarlton, L. H. Lowe,* and *Linton S. Savage* were on the brief, for appellants. *Messrs. Sidney P. Chandler, Claude V. Birkhead,* and *M. D. Brown* were on the brief for appellees. Reported below: 12 S. W. (2d) 540.

No. —, original. EX PARTE HAGENSON. Motion submitted January 13, 1930. Decided January 27, 1930. The motion for leave to proceed *in forma pauperis* and for leave to file petition for a writ of prohibition is denied. *Mr. Winter S. Martin* for petitioner.

No. 426. AUBREY ET AL. *v.* MAHONING VALLEY SANITARY DISTRICT ET AL. Appeal from the Supreme Court of Ohio. Motion submitted January 20, 1930. Decided January 27, 1930. The motion to dismiss as to the parties appellants, Aubrey and Callan, is granted. and the motion of Pauline Gottlieb for leave to intervene and to be substituted as the party appellant is also granted. *Mr. Harry J. Gerrity* in support of the motion. 120 Ohio St. 449.

No. 17, original. NEW JERSEY *v.* NEW YORK ET AL. January 27, 1930. The motion for the appointment of a special master in this case is granted; and Charles N. Burch, Esquire, of Memphis, Tennessee, is appointed special master in this cause with power to issue subpœnas for witnesses and to take such evidence as may be introduced and such as he may deem necessary. The master is directed to make findings of fact and conclusions of law,

and to submit the same to this Court with all convenient speed, together with his recommendations for a decree. The findings, conclusions, and recommendations of the special master shall be subject to consideration, rejection, revision, or approval by the Court. *Messrs. Duane E. Minard* and *Wm. A. Stevens* for complainant. *Messrs. Hamilton Ward, Thos. Penney, Jr., Paul Shipman Andrews, Arthur J. W. Hilly, J. Joseph Lilly, Frank J. Coyle, Frank H. Dial,* and *David C. Broderick* for respondents.

No. 165. NASHVILLE, CHATTANOOGA & ST. LOUIS R. CO. ET AL. *v.* MORGAN ET AL. Appeal from the Supreme Court of Tennessee. Argued January 22, 1930. Decided January 27, 1930. *Per Curiam:* The judgment herein is affirmed by an equally divided Court. *Mr. Fitzgerald Hall,* with whom *Messrs. Frank Slemons* and *Walton Whitwell* were on the brief, for appellants. *Messrs. J. B. Sizer* and *Joe Frassrand* were on the brief for appellees. 160 Tenn. 316.

No. 184. MURPHEY *v.* CORPORATION COMMISSION OF NORTH CAROLINA. Appeal from the Supreme Court of North Carolina. Argued January 24, 1930. Decided January 27, 1930. *Per Curiam:* Judgment affirmed. *Coffin Brothers & Co.* v. *Bennett,* 277 U. S. 29; *Missouri Pacific R. Co.* v. *Nebraska,* 164 U. S. 403, 414; *Knights of Pythias* v. *Meyer,* 265 U. S. 30, 32–33. *Mr. J. A. Jones* for appellant. *Messrs. Dennis G. Brummitt,* Attorney General of North Carolina, and *I. M. Bailey* for appellee. Reported below: 147 S. E. 667.

No. 167. HANOVER FIRE INS. CO. *v.* SPECKTOR ET AL. Appeal from the Supreme Court of Pennsylvania. Argued January 24, 1930. Decided January 27, 1930. *Per*

Curiam: The appeal is dismissed for the want of a substantial federal question. *Shulthis* v. *McDougal,* 225 U. S. 561, 569; *Hull* v. *Burr,* 234 U S. 712, 720; *Norton* v. *Whiteside,* 239 U. S. 144, 147. Treating the papers whereon the appeal was allowed as a petition for certiorari, as required by § 237 (c) of the Judicial Code as amended by the Act of February 13, 1925 (c. 229, 43 Stat. 936, 938), certiorari is denied. *Mr. Horace Michener Schell,* with whom *Mr. Henry A. Craig* was on the brief, for appellant. *Mr. Wm. A. Gray* for appellees. Reported below: 295 Pa. 390.

PETITIONS FOR CERTIORARI GRANTED, FROM OCTOBER 7, 1929, TO AND INCLUDING JANUARY 27, 1930.

No. 122. FEDERAL RADIO COMM'N *v.* GENERAL ELECTRIC CO. ET AL. October 14, 1929. Petition for writ of certiorari to the Court of Appeals of the District of Columbia granted. *Messrs. Louis J. Caldwell, Paul M. Segal,* and *Bethuel M. Webster, Jr.,* for petitioner. *Messrs. Frank J. Hogan, Wm. H. Donovan, Charles E. Hughes,* and *Allen S. Hubbard* for respondents. Reported below: 31 F. (2d) 630.

No. 87. BALTIMORE & OHIO SOUTHWESTERN R. CO. *v.* CARROLL. October 14, 1929. The petition for a writ of certiorari herein to the Supreme Court of Indiana is granted with the limitation, however, that counsel shall confine themselves, in the briefs and in oral argument, to the question whether this suit is barred by the statute of limitations. *Messrs. Wm. A. Eggers, Morison R. Waite,* and *Cassius W. McMullen* for petitioner. *Messrs. Wm. J. Hughes* and *O. H. Montgomery* for respondent. Reported below: 163 N. E. 99.

No. 123. ROYAL INSURANCE CO., LTD., ET AL. *v.* U. S. SHIPPING BOARD MERCHANT FLEET CORP. October 14, 1929. The petition for a writ of certiorari herein to the Circuit Court of Appeals for the Second Circuit granted, with provisions for advancement of the cause, to be heard with other related causes. *Mr. John C. Crawley* for petitioners. *Solicitor General Hughes, Assistant Attorney General Farnum,* and *Mr. J. Frank Staley* for respondent. Reported below: 30 F. (2d) 946.

No. 81. EMPLOYERS' LIABILITY ASSURANCE CORP., LTD., *v.* COOK ET AL. October 14, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Messrs. Clyde A. Sweeton* and *W. A. Vinson* for petitioner. *Mr. D. A. Simmons* for respondents. Reported below: 31 F. (2d) 497.

No. 89. TEXAS & PACIFIC R. Co. *v.* GUIDRY. October 14, 1929. Petition for a writ of certiorari to the Court of Civil Appeals, Sixth Supreme Judicial District, State of Texas, granted. *Mr. T. D. Gresham* for petitioner. *Mr. S. P. Jones* for respondent. Reported below: 9 S. W. (2d) 284.

No. 92. LUCAS, COMMISSIONER OF INTERNAL REVENUE, *v.* NORTH TEXAS LUMBER CO. October 14, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Attorney General Mitchell, Assistant Attorney General Willebrandt,* and *Messrs. Alfred A. Wheat* and *Randolph C. Shaw* for petitioner. *Messrs. Albert B. Hall* and *Joseph J. Eckford* for respondent. Reported below: 30 F. (2d) 680.

No. 93. COOPER *v.* UNITED STATES. October 14, 1929. Petition for writ of certiorari to the Court of Claims granted. *Mr. Wayne Johnson* for petitioner. *Solicitor General Hughes, Assistant Attorney General Galloway,* and *Messrs. Lisle A. Smith* and *Henry A. Cox* for the United States. Reported below: 67 Ct. Cls. 711.

No. 99. LUCAS, COMMISSIONER OF INTERNAL REVENUE, *v.* EARL. October 14, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Attorney General Mitchell, Assistant Attorney*

General Willebrandt, and *Messrs. Alfred A. Wheat* and *Millar E. McGilchrist* for petitioner. *Messrs. Warren Olney, Jr.*, and *J. M. Manon, Jr.*, for respondent. Reported below: 30 F. (2d) 898.

No. 114. RENZIEHAUSEN *v.* LUCAS, COMMISSIONER OF INTERNAL REVENUE. October 14, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Messrs. Wm. A. Seifert* and *Wm. Wallace Booth* for petitioner. *Solicitor General Hughes*, and *Messrs. J. Louis Monarch* and *John Vaughan Groner* for respondent. Reported below: 31 F. (2d) 675.

No. 118. FLORSHEIM BROTHERS DRYGOODS CO., LTD., *v.* UNITED STATES. October 14, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Mr. E. H. Randolph* for petitioner. *Solicitor General Hughes*, and *Messrs. Sewall Key* and *Barham R. Gary* for the United States. Reported below: 29 F. (2d) 895.

No. 127. UNIVERSAL BATTERY CO. *v.* UNITED STATES. October 14, 1929. Petition for writ of certiorari to the Court of Claims granted. *Mr. George Maurice Morris* for petitioner. *Solicitor General Hughes, Assistant Attorney General Galloway*, and *Messrs. George C. Butte* and *R. C. Williamson* for the United States. Reported below: 66 Ct. Cls. 748.

No. 128. UNITED STATES *v.* AMERICAN CAN CO.;

No. 129. SAME *v.* MISSOURI CAN CO.; and

No. 130. SAME *v.* DETROIT CAN CO. October 14, 1929. Petition for writs of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Solicitor General*

Hughes, Assistant Attorney General Willebrandt, and *Mr. Millar E. McGilchrist* for the United States. *Mr. Graham Sumner* for respondents. Reported below: 31 F. (2d) 730.

No. 179. UNITED STATES FIDELITY & GUARANTY CO. *v.* GUENTHER. October 21, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit granted. *Mr. C. M. Horn* for petitioner. *Messrs. James G. Bachman* and *Wm. M. Byrnes* for respondent. Reported below: 31 F. (2d) 919.

No. 188. DAVIS *v.* PRESTON. October 21, 1929. Petition for writ of certiorari to the Supreme Court of Texas granted. *Messrs. W. L. Cook* and *Sidney F. Andrews* for petitioner. *Mr. Robert L. Cole* for respondent. Reported below: 16 S. W. (2d) 117.

No. 198. ALUMINUM CASTINGS CO. *v.* ROUTZAHN. October 21, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit granted. *Mr. John T. Scott* for petitioner. *Solicitor General Hughes,* and *Messrs. Sewall Key* and *Millar E. McGilchrist* for respondent. Reported below: 31 F. (2d) 669.

No. 212. NEW YORK CENTRAL R. CO. *v.* MARCONE. October 21, 1929. Petition for writ of certiorari to the Court of Errors and Appeals of New Jersey granted. *Mr. Albert C. Wall* for petitioner. No appearance for respondent. Reported below: 144 Atl. 635.

No. 226. EARLY *v.* FEDERAL RESERVE BANK OF RICHMOND. October 21, 1929. Petition for writ of certiorari

to the Circuit Court of Appeals for the Fourth Circuit granted. *Mr. R. E. Whiting* for petitioner. *Mr. M. G. Wallace* for respondent. Reported below: 30 F. (2d) 198.

No. 229. DISTRICT OF COLUMBIA *v.* FRED. October 21, 1929. Petition for writ of certiorari to the Court of Appeals of the District of Columbia granted. *Mr. Wm. W. Bride* for petitioner. No appearance for respondent. Reported below: 33 F. (2d) 375.

No. 248. NOGUEIRA *v.* NEW YORK, NEW HAVEN & HARTFORD R. Co. October 21, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. Humphrey J. Lynch* for petitioner. *Messrs. John M. Gibbons* and *Edward R. Brumley* for respondent. Reported below: 32 F. (2d) 179.

No. 250. LUCAS, COMMISSIONER OF INTERNAL REVENUE, *v.* OX FIBRE BRUSH Co. October 21, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit granted. *Solicitor General Hughes* and *Mr. Morton P. Fisher* for petitioner. *Messrs. Albert L. Hopkins* and *Merritt Starr* for respondent. Reported below: 32 F. (2d) 42.

No. 261. MILLER *v.* MCLAUGHLIN. October 21, 1929. Petition for writ of certiorari to the Supreme Court of Nebraska granted. *Mr. A. Henry Walter* for petitioner. No appearance for respondent. Reported below: 224 N. W. 18.

No. 270. THE HENRIETTA MILLS *v.* RUTHERFORD COUNTY ET AL. October 21, 1929. Petition for writ of

certiorari to the Circuit Court of Appeals for the Fourth Circuit granted. *Messrs. Murray Allen* and *Willis Smith* for petitioner. No appearance for respondents. Reported below: 32 F. (2d) 570.

No. 300. QUAPAW LAND CO., INC., *v.* BOLINGER. October 21, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Messrs. F. W. Clements* and *S. L. Herold* for petitioner. *Messrs. Frank J. Looney* and *J. M. Grimmet* for respondent. Reported below: 32 F. (2d) 627.

No. 303. ATCHISON, TOPEKA & SANTA FE R. Co. *v.* TOOPS. October 21, 1929. Petition for writ of certiorari to the Supreme Court of Kansas granted. *Messrs. Alfred A. Scott, E. E. McInnis, Wm. R. Smith,* and *Alfred G. Armstrong* for petitioner. *Mr. Carr W. Taylor* for respondent. Reported below: 128 Kan. 189.

No. 305. FRANC-STROHMENGER & COWAN, INC., *v.* FORCHHEIMER. October 21, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit granted. *Messrs. Holland S. Duell, Clifford E. Dunn, Frederick P. Fish,* and *Charles Neave* for petitioner. *Mr. O. Ellery Edwards* for respondent. Reported below: 32 F. (2d) 696.

No. 311. MAY ET AL. *v.* HEINER, COLLECTOR. October 21, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Mr. Charles H. Sachs* for petitioners. *Solicitor General Hughes* and *Mr. Sewall Key* for respondent. Reported below: 32 F. (2d) 1017.

No. 314. NILES BEMENT POND CO. *v.* UNITED STATES. October 21, 1929. Petition for writ of certiorari to the Court of Claims granted. *Messrs. Karl D. Loos, E. Barrett Prettyman,* and *Preston B. Kavanaugh* for petitioner. *Solicitor General Hughes, Assistant Attorney General Galloway,* and *Messrs. Claude R. Branch* and *R. C. Williamson* for the United States. Reported below: 67 Ct. Cls. 693.

No. 323. LUCAS, COMMISSIONER, *v.* KANSAS CITY STRUCTURAL STEEL CO.; and

No. 324. SAME *v.* SAME. October 21, 1929. Petition for writs of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Solicitor General Hughes* and *Messrs. Sewall Key* and *Randolph C. Shaw* for petitioner. *Mr. Armwell L. Cooper* for respondent. Reported below: 33 F. (2d) 53.

No. 334. BECKER STEAMSHIP CO. *v.* SNYDER. October 21, 1929. Petition for writ of certiorari to the Court of Appeals of Ohio granted. *Messrs. Frederick L. Leckie, S. H. Holding,* and *Tracy H. Duncan* for petitioner. *Mr. Luther Day* for respondent. Reported below: 31 Ohio App. 379.

No. 340. UNITED STATES *v.* UPDIKE ET AL. October 21, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Solicitor General Hughes* and *Mr. Sewall Key* for the United States. *Messrs. Francis A. Brogan, Alfred G. Ellick,* and *Anan Raymond* for respondents. Reported below: 32 F. (2d) 1.

No. 344. CORLISS *v.* BOWERS, COLLECTOR. October 21, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. Joseph M.*

Hartfield for petitioner. *Solicitor General Hughes,* and *Messrs. Randolph C. Shaw* and *F. W. Dewart* for respondent. Reported below: 34 F. (2d) 656.

No. 345. U. S. Shipping Board Merchant Fleet Corp. *v.* Harwood. October 21, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Solicitor General Hughes* and *Messrs. Claude R. Branch* and *Chauncey G. Parker* for petitioner. *Messrs. Frederick H. Wood* and *Herbert B. Lee* for respondent. Reported below: 32 F. (2d) 680.

No. 356. Lucas, Commissioner, *v.* Pilliod Lumber Co. October 21, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit granted. *Solicitor General Hughes* and *Mr. Sewall Key* for petitioner. *Messrs. Herbert W. Nauts* and *Henry M. Ward* for respondent. Reported below: 33 F. (2d) 245.

No. 363. Georgia Power Co. *v.* Decatur. October 21, 1929. Petition for writ of certiorari to the Supreme Court of Georgia granted. *Messrs. Walter T. Colquitt* and *Ben J. Conyers* for petitioner. *Mr. Hooper Alexander* for respondent. Reported below: 149 S. E. 32.

No. 365. Escher *v.* Woods. October 21, 1929. Petition for writ of certiorari to the Court of Appeals of the District of Columbia granted. *Messrs. Spier Whitaker* and *Lyttleton Fox* for petitioner. *Solicitor General Hughes, Assistant Attorney General Farnum,* and *Messrs. Claude R. Branch* and *Henry A. Cox* for respondent. Reported below: 33 F. (2d) 556.

No. 370. FEDERAL TRADE COMM'N *v.* WESTERN MEAT CO. ET AL. October 21, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Solicitor General Hughes,* and *Messrs. Robert E. Healy, Alfred M. Craven,* and *Claude R. Branch* for petitioner. *Messrs. Edward I. Barry* and *Frank L. Horton* for respondents. Reported below: 33 F. (2d) 824.

No. 372. CINCINNATI *v.* VESTER;

No. 373. SAME *v.* RICHARDS ET AL.; and

No. 374. SAME *v.* REAKIRT. October 21, 1929. Petition for writs of certiorari to the Circuit Court of Appeals for the Sixth Circuit granted. *Messrs. John D. Ellis* and *Ed F. Alexander* for petitioner. *Messrs. John Weld Peck* and *Milton Sayler* for respondents. Reported below: 33 F. (2d) 242.

No. 375. WESTERN CARTRIDGE CO. *v.* EMMERSON. October 21, 1929. Petition for writ of certiorari to the Supreme Court of Illinois granted. *Mr. Colin C. H. Fyffe* for petitioner. *Messrs. Oscar E. Carlstrom* and *Bayard Lacey Catron* for respondent. Reported below: 335 Ill. 150.

No. 390. JAMISON ET AL. *v.* ENCARNACION. October 21, 1929. Petition for writ of certiorari to the Supreme Court of New York granted. *Messrs. James B. Henney* and *Daniel Miner* for petitioners. *Messrs. Wm. S. Butler* and *James A. Gray* for respondent. Reported below: 224 App. Div. 260; 226 App. Div. 769.

No. 397. CHARTER SHIPPING CO., LTD., *v.* BOWRING JONES & TIDY, LTD. October 21, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the

Second Circuit granted. *Mr. Cletus Keating* for petitioner. *Mr. Theodore L. Bailey* for respondent. Reported below: 33 F. (2d) 280.

No. 402. UNITED STATES *v.* GUARANTY TRUST CO. ET AL. October 21, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Solicitor General Hughes, Assistant to the Attorney General O'Brian,* and *Messrs. Claude R. Branch* and *Elmer B. Collins* for the United States. *Messrs. Joseph M. Hartfield, Edwin S. S. Sunderland, James H. McIntosh, Henry V. Poor, Charles Bunn, Warren S. Carter, Mortimer H. Boutelle,* and *Edward H. Blanc* for respondents. Reported below: 33 F. (2d) 533.

No. 412. TODOK ET AL. *v.* UNION STATE BANK. October 21, 1929. Petition for writ of certiorari to the Supreme Court of Nebraska granted. *Messrs. Frank E. Edgerton* and *Norris Brown* for petitioners. *Mr. Frank D. Williams* for respondent. Reported below: 223 N. W. 664.

No. 425. PANAMA MAIL STEAMSHIP CO. *v.* VARGAS. October 21, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Mr. Thomas A. Thatcher* for petitioner. *Mr. H. W. Hutton* for respondent. Reported below: 33 F. (2d) 894.

No. 275. VESTA BATTERY CORP. *v.* UNITED STATES. October 21, 1929. Petition for writ of certiorari to the Court of Claims granted and the case advanced for argument with case No. 127 as one case. *Mr. George M. Morris* for petitioner. *Solicitor General Hughes, Assist-*

ant Attorney General Galloway, and *Messrs. Claude R. Branch* and *R. C. Williamson* for the United States. Reported below: 67 Ct. Cls. 711.

No. 329. GOOD SPRINGS ANCHOR CO. *v.* UNITED STATES. See *ante,* p. 515.

No. 414. WHITE, COLLECTOR, *v.* HOOD RUBBER CO. October 28, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit granted. *Solicitor General Hughes,* and *Messrs. Claude R. Branch, Sewall Key,* and *Barham R. Gary* for petitioner. *Messrs. Frank S. Bright* and *H. Stanley Hinrichs* for respondent. Reported below: 33 F. (2d) 739.

No. 423. COLLIE ET AL. *v.* FERGUSSON ET AL. October 28, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit granted. *Mr. Jacob L. Morewitz* for petitioners. *Mr. Leon T. Seawell* for respondents. Reported below: 31 F. (2d) 1010.

No. 350. BASSICK MFG. CO. *v.* UNITED STATES;

No. 351. F. W. STEWART MFG. CO. *v.* SAME; and

No. 352. GEMCO MFG. CO. *v.* SAME. November 4, 1929. The petitions for writs of certiorari herein to the Court of Claims are granted, and the cases assigned for argument with cases Nos. 127 and 275, as one case. *Mr. George M. Wilmeth* for petitioners. *Solicitor General Hughes, Assistant Attorney General Galloway,* and *Messrs. Claude R. Branch, R. C. Williamson,* and *W. Marvin Smith* for the United States. Reported below: 68 Ct. Cls. 366, 67 Ct. Cls. 275, and 67 Ct. Cls. 287, respectively.

No. 424. DANOVITZ *v.* UNITED STATES. November 4, 1929. The petition for a writ of certiorari herein to the Circuit Court of Appeals for the Third Circuit is granted, with the limitation, however, that counsel shall confine themselves, in the briefs and in oral argument, to the question whether the property seized is forfeitable under § 25, Title II, of the national prohibition act. *Messrs. John W. Dunkle* and *Ward Bonsall* for petitioner. *Solicitor General Hughes,* and *Messrs. Claude R. Branch, Howard T. Jones,* and *John J. Byrne* for the United States. Reported below: 34 F. (2d) 30.

No. 389. CHESAPEAKE & POTOMAC TELEPHONE CO. *v.* UNITED STATES. November 25, 1929. Petition for writ of certiorari to the Court of Claims granted. *Messrs. Stanton C. Peelle, C. F. R. Ogilby, Paul E. Lesh, Dale D. Drain,* and *Jerome F. Barnhard* for petitioner. *Solicitor General Hughes, Assistant Attorney General Galloway,* and *Messrs. Claude R. Branch, Heber H. Rice,* and *W. Marvin Smith* for the United States. Reported below: 68 Ct. Cls. 273.

No. 428. TYLER ET AL. *v.* UNITED STATES. November 25, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit granted. *Messrs. Frank S. Bright,* and *H. Stanley Hinrichs* for petitioners. *Solicitor General Hughes, Messrs. Claude R. Branch* and *Sewall Key,* and *Helen R. Carloss* for the United States. Reported below: 33 F. (2d) 724.

No. 443. CAMPBELL, FEDERAL PROHIBITION ADMINISTRATOR, ET AL. *v.* GALENO CHEMICAL CO., INC., ET AL.;

No. 444. SAME *v.* D. P. PAUL & CO., INC.; and

No. 445. SAME *v.* W. H. LONG & CO. December 2, 1929. Petition for writs of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Solicitor Gen-*

eral Hughes, and *Messrs. John Henry McEvers* and *Mahlon D. Kiefer,* for petitioners. *Mr. Charles Dickerman Williams* for Galeno Chemical Company et al. and D. P. Paul & Company; and *Mr. Lewis Landes* for W. H. Long & Co. 34 F. (2d) 645.

No. 452. RICHBOURG MOTOR CO. *v.* UNITED STATES. December 2, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit granted. *Messrs. Joseph G. Myerson* and *R. R. Williams* for petitioner. *Solicitor General Hughes,* and *Messrs. Claude R. Branch, Mahlon D. Kiefer,* and *W. Marvin Smith* for the United States. Reported below: 34 F. (2d) 38.

No. 457. ALPHA STEAMSHIP CORP'N, ET AL. *v.* CAIN. December 2, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. Carver W. Wolfe* for petitioners. *Mr. Melville J. France* for respondent. 35 F. (2d) 717.

No. 462. LUCAS, COMMISSIONER OF INTERNAL REVENUE *v.* REED. December 2, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Solicitor General Hughes* for petitioner. *Mr. Maynard Teall* for respondent. Reported below: 34 F. (2d) 263.

No. 463. JACKSON *v.* UNITED STATES. December 2, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit granted. *Mr. Thomas Amory Lee* for petitioner. *Solicitor General Hughes, Assistant Attorney General Farnum,* and *Mr. W. Clifton Stone* for the United States. Reported below: 34 F. (2d) 241.

No. 469. TEXAS & NEW ORLEANS R. CO. ET AL. *v.* BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS ET AL. December 9, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Messrs. H. M. Garwood* and *J. H. Tallichet* for petitioners. *Messrs. Donald R. Richberg* and *John H. Crooker* for respondents. Reported below: 33 F. (2d) 13.

No. 477. BARKER PAINTING CO. *v.* LOCAL NO. 734, BROTHERHOOD OF PAINTERS. December 9, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Mr. Merritt Lane* for petitioner. *Mr. Morris Hillquit* for respondent. Reported below: 34 F. (2d) 3.

No. 464. BRINKERHOFF-FARIS TRUST & SAVINGS CO. *v.* HILL, TREASURER. January 6, 1930. On further consideration, the order of December 2, 1929, denying the petition for certiorari herein to the Supreme Court of Missouri is revoked and the petition is now granted. *Mr. Roy W. Rucker* for petitioner. *Mr. Lieutellus Cunningham* for respondent. Reported below: 19 S. W. (2d) 746.

No. 269. MEADOWS *v.* UNITED STATES. January 6, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Mr. Jean S. Breitenstein* for petitioner. *Solicitor General Hughes, Assistant Attorney General Farnum,* and *Messrs. Claude R. Branch, James O'C. Roberts,* and *James T. Brady* for the United States. Reported below: 32 F. (2d) 570.

No. 530. UNITED STATES *v.* EQUITABLE TRUST CO. ET AL. January 20, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted.

Solicitor General Hughes, Assistant Attorney General Richardson, and *Mr. George C. Butte* for the United States. *Messrs. Carroll G. Walter* and *Almond D. Cochran* for respondents. Reported below: 34 F. (2d) 916.

No. 546. UNITED STATES *v.* PROVIDENT TRUST CO. ET AL.; and

No. 547. LUCAS, COMMISSIONER OF INTERNAL REVENUE *v.* GIRARD TRUST CO. ET AL. January 20, 1930. Petition for writs of certiorari to the Circuit Court of Appeals for the Third Circuit granted. The motion to advance is granted and the cases assigned for hearing following the hearing of case No. 428. *Solicitor General Hughes* for petitioners. No appearance for respondents. Reported below: 35 F. (2d) 339.

No. 520. LEKTOPHONE CORP'N *v.* ROLA CO. January 27, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Messrs. Charles E. Hughes* and *Wm. H. Davis* for petitioner. No appearance for respondent. Reported below: 34 F. (2d) 764.

No. 528. BROAD RIVER POWER CO. ET AL. *v.* SOUTH CAROLINA EX REL. DANIEL, ATTORNEY GENERAL. January 27, 1930. Petition for writ of certiorari to the Supreme Court of South Carolina granted. *Mr. Wm. Marshall Bullitt* for petitioners. *Messrs. John M. Daniel, Cordie Page,* and *W. S. Nelson* for respondent.

No. 535. WILLCUTS, COLLECTOR, *v.* BUNN. January 27, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Solicitor General Hughes, Assistant Attorney General Youngquist,* and *Mr. Sewall Key* for petitioner. *Mr. Charles Bunn, pro se.* Reported below: 35 F. (2d) 29.

PETITIONS FOR CERTIORARI DENIED, FROM OCTOBER 7, 1929, TO AND INCLUDING JANUARY 27, 1930.

No. 190. DAVID *v.* HUBBARD, TRUSTEE IN BANKRUPTCY; and

No. 191. SAME *v.* SAME. See *ante*, p. 514.

No. 388. BROWN ET AL. *v.* CALIFORNIA. See *ante*, p. 515.

No. 72. SECOND NATIONAL BANK *v.* UNITED STATES. October 14, 1929. Petition for writ of certiorari to the Court of Claims denied. *Mr. Theodore B. Benson* for petitioner. *Solicitor General Hughes, Assistant Attorney General Galloway*, and *Mr. Joseph H. Sheppard* for the United States. Reported below: 66 Ct. Cls. 166.

No. 74. COLGATE *v.* UNITED STATES. October 14, 1929. Petition for writ of certiorari to the Court of Claims denied. *Messrs. George A. King, Louis Titus*, and *C. Bascom Slemp* for petitioner. *Solicitor General Hughes* and *Assistant Attorney General Galloway* for the United States. See *ante*, p. 43. Reported below: 66 Ct. Cls. 667.

No. 76. DAMPSKIBSSELSKABET NORDEN *v.* UNITED STATES. October 14, 1929. Petition for writ of certiorari to the Court of Claims denied. *Mr. Charles R. Hickox* for petitioner. *Solicitor General Hughes, Assistant Attorney General Galloway*, and *Mr. J. Frank Staley* for the United States. Reported below: 66 Ct. Cls. 661.

No. 78. PIEDMONT GROCERY CO. *v.* UNITED STATES. October 14, 1929. Petition for writ of certiorari to the Court of Claims denied. *Mr. Harry G. Fisher* for petitioner. *Attorney General Mitchell, Assistant Attorney General Galloway,* and *Mr. Fred K. Dyar* for the United States. Reported below: 66 Ct. Cls. 468.

No. 80. KELLY *v.* WATKINS ET AL. October 14, 1929. Petition for writ of certiorari to the Supreme Court of Oklahoma denied. *Mr. E. E. Blake* for petitioner. *Mr. J. B. Moore* for respondents. Reported below: 135 Okla. 276.

No. 82. ABBOTT *v.* UNITED STATES. October 14, 1929. Petition for writ of certiorari to the Court of Claims denied. *Messrs. John F. McCarron* and *George E. Hamilton* for petitioner. *Solicitor General Hughes, Assistant Attorney General Galloway,* and *Mr. Fred K. Dyar* for the United States. Reported below: 66 Ct. Cls. 603.

No. 83. HIGGINBOTHAM-BAILEY-LOGAN CO. ET AL. *v.* INTERNATIONAL SHOE CO. ET AL. October 14, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Lee Gammage Carter* for petitioners. No appearance for respondents. Reported below: 29 F. (2d) 994.

No. 84. ROGERS *v.* CANADIAN NATIONAL R. CO. October 14, 1929. Petition for writ of certiorari to the Supreme Court of Michigan denied. *Messrs. Wm. R. Walsh* and *Joseph Walsh* for petitioner. *Messrs. H. R. Martin* and *Leo J. Carrigan* for respondent. Reported below: 246 Mich. 399.

No. 85. WILHITE ET AL. *v.* UNITED STATES. October 14, 1929. Petition for writ of certiorari to the Court of Claims denied. *Messrs. L. L. Hamby* and *Henry J. Richardson* for petitioners. *Solicitor General Hughes, Assistant Attorney General Galloway,* and *Mr. Fred K. Dyar* for the United States. Reported below: 67 Ct. Cls. 290.

No. 88. FOSTER *v.* ALABAMA DRY DOCK & SHIPBUILDING CO. October 14, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Palmer Pillans* for petitioner. *Mr. Harry H. Smith* for respondent. Reported below: 31 F. (2d) 394.

No. 94. SHERRY *v.* BALTIMORE & OHIO R. CO. October 14, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Andrew M. Henderson* for petitioner. *Mr. Union C. De Ford* for respondent. Reported below: 30 F. (2d) 487.

No. 95. COMPAGNIE GENERALE TRANSATLANTIQUE *v.* AMERICAN TOBACCO CO. October 14, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Joseph P. Nolan* and *Anthony J. Ernest* for petitioner. *Messrs. Jonothan H. Holmes, John David Lannon,* and *Clinton Robb* for respondent. Reported below: 31 F. (2d) 663.

No. 96. COUNTY OF GALLATIN ET AL. *v.* YELLOWSTONE PARK TRANSPORTATION CO. October 14, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. T. J. Walsh* for petitioners. *Mr. T. B. Weir* for respondent. Reported below: 31 F. (2d) 644.

No. 97. CUTTING *v.* BRYAN ET AL. October 14, 1929. Petition for writ of certiorari to the Supreme Court of California denied. *Mr. Peter F. Dunne* for petitioner. *Mr. John L. McNab* for respondents. Reported below: 274 Pac. 326.

No. 100. JONES *v.* WHALEY. October 14, 1929. Petition for writ of certiorari to the Supreme Court of South Carolina denied. *Mr. Wm. C. Wolfe* for petitioner. *Messrs. A. J. Hydrick* and *Adam H. Moss* for respondent. Reported below: 149 S. E. 841.

No. 101. MCCLOSKEY *v.* TOLEDO PRESSED STEEL CO. October 14, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. George E. Kirk* for petitioner. No appearance for respondent. Reported below: 30 F. (2d) 12.

No. 102. MCDONALD ET AL. *v.* LOUISIANA EX REL. DEMA REALTY CO. October 14, 1929. Petition for writ of certiorari to the Supreme Court of Louisiana denied. *Messrs. W. J. Waguespack* and *W. J. Waguespack, Jr.*, for petitioners. No appearance for respondent. Reported below: 121 So. 613.

No. 103. FULLER *v.* UNITED STATES. October 14, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Stanley C. Fowler* for petitioner. *Solicitor General Hughes, Assistant Attorney General Luhring,* and *Mr. Harry S. Ridgely* for the United States. Reported below: 31 F. (2d) 747.

No. 105. MORGAN *v.* UNITED STATES; and

No. 106. HUST *v.* SAME. October 14, 1929. Petition for writs of certiorari to the Circuit Court of Appeals for

the Seventh Circuit denied. *Messrs. James Hamilton Lewis, Benjamin P. Epstein,* and *Bernhardt Frank* for petitioners. *Solicitor General Hughes, Assistant Attorney General Luhring,* and *Mr. Harry S. Ridgely* for the United States. Reported below: 31 F. (2d) 385.

No. 107. PRENDERGAST *v.* SILVERADO STEAMSHIP CO. October 14, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Wm. Martin* and *J. O. Davies* for petitioner. *Messrs. Frank A. Huffer, W. H. Hayden, F. T. Merritt,* and *Lane Summers* for respondent. Reported below: 31 F. (2d) 225.

No. 108. MOHR ET AL. *v.* BIELASKI, TRUSTEE, ET AL. October 14, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Murray Corrington* for petitioners. No appearance for respondents. Reported below: 32 F. (2d) 189.

No. 109. WILSON BANKING CO. *v.* LUCAS, COMMISSIONER OF INTERNAL REVENUE. October 14, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. A. M. Pepper* for petitioner. *Solicitor General Hughes,* and *Messrs. Sewall Key* and *Harvey R. Gamble* for respondent. Reported below: 30 F. (2d) 1023.

No. 110. BEYER *v.* SMITH. October 14, 1929. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Messrs. Daniel Thew Wright* and *Philip Ershler* for petitioner. No appearance for respondent. Reported below: 32 F. (2d) 423.

No. 111. H. KOBACKER & SONS CO. *v.* NORWICH UNION INDEMNITY CO. October 14, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. James I. Boulger* for petitioner. *Mr. H. A. Hauxhurst* for respondent. Reported below: 31 F. (2d) 411.

No. 112. GUARANTY TRUST CO. ET AL. *v.* NOXON CHEMICAL PRODUCTS CO. ET AL. October 14, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Wm. C. Cannon* for petitioners. *Mr. Robert Carey* for respondents. Reported below: 31 F. (2d) 556.

No. 116. LOEWER REALTY CO. *v.* ANDERSON. October 14, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. E. Barrett Prettyman, Karl D. Loos,* and *Arthur B. Hyman* for petitioner. *Solicitor General Hughes,* and *Messrs. John Vaughan Groner* and *Clarence M. Charest* for respondent. Reported below: 31 F. (2d) 268.

No. 117. INTERNATIONAL-GREAT-NORTHERN R. CO. ET AL. *v.* HAILEY. October 14, 1929. Petition for writ of certiorari to the Court of Civil Appeals, Tenth Supreme Judicial District, State of Texas, denied. *Messrs. W. L. Cook* and *Frank Andrews* for petitioners. No appearance for respondent. Reported below: 9 S. W. (2d) 182.

No. 120. GALVESTON DRY DOCK & CONSTRUCTION CO. *v.* U. S. SHIPPING BOARD MERCHANT FLEET CORP'N. October 14, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Brantly Harris* and *John David Watkins* for petitioner.

Solicitor General Hughes, Assistant Attorney General Farnum, and *Mr. J. Frank Staley* for respondent. Reported below: 31 F. (2d) 247.

No. 121. CLARK ET AL. *v.* LANAHAN ET AL. October 14, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. John M. Freeman* and *Wm. L. Day* for petitioners. *Messrs. Owen J. Roberts* and *John S. Weller* for respondents. Reported below: 31 F. (2d) 419.

No. 124. NATIONAL CITY BANK *v.* CARTER. October 14, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. A. Longstreet Heiskell* for petitioner. *Messrs. Sam O. Bates* and *Walter Chandler* for respondent. Reported below: 31 F. (2d) 25.

No. 125. UNITED STATES *v.* SLIGH. October 14, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Solicitor General Hughes, Assistant Attorney General Farnum,* and *Messrs. W. Clifton Stone* and *James T. Brady* for the United States. *Mr. Loy J. Molumby* for respondent. Reported below: 31 F. (2d) 735.

No. 126. THOMAS *v.* GATES, TRUSTEE. October 14, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Joseph W. Cox* for petitioner. No appearance for respondent. Reported below: 31 F. (2d) 828.

No. 131. WHITAKER *v.* UNITED STATES; and

No. 132. MCCANN *v.* SAME. October 14, 1929. Petition for writs of certiorari to the Circuit Court of Appeals

for the Second Circuit denied. *Mr. Silas B. Axtell* for Whitaker. *Mr. John Joseph McCann, pro se. Solicitor General Hughes, Assistant Attorney General Luhring,* and *Mr. Harry S. Ridgely* for the United States. Reported below: 32 F. (2d) 540.

No. 134. HARBISON *v.* LEWELLYN, FORMERLY COLLECTOR;
No. 135. BROOKS *v.* SAME;
No. 136. LEWIS *v.* SAME;
No. 137. MORGANROTH *v.* SAME;
No. 138. CROFT *v.* SAME;
No. 139. WILLEY *v.* SAME;
No. 140. WALKER *v.* SAME;
No. 141. YOUNGMAN *v.* SAME;
No. 142. REIF *v.* SAME;
No. 143. PONTEFRACT *v.* SAME;
No. 144. HARBISON *v.* SAME;
No. 145. HARBISON *v.* SAME;
No. 146. MCQUILLEN *v.* SAME;
No. 147. SEAVER *v.* SAME; and
No. 148. HILLEMAN *v.* SAME. October 14, 1929. Petition for writs of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. J. E. McCloskey, Jr.,* and *F. H. Atwood* for petitioners. *Solicitor General Hughes* and *Messrs. Howard T. Jones* and *Millar E. McGilchrist* for respondent. Reported below: 31 F. (2d) 740.

No. 150. MONTGOMERY COTTON MILLS, INC., *v.* UNITED STATES. October 14, 1929. Petition for writ of certiorari to the Court of Claims denied. *Mr. Stanley Hinrichs* for petitioner. *Solicitor General Hughes, Assistant Attorney General Galloway,* and *Messrs. George C. Butte* and *R. C. Williamson* for the United States. Reported below: 67 Ct. Cls. 169.

No. 151. WARD BAKING CORP'N *v.* UNITED STATES. October 14, 1929. Petition for writ of certiorari to the Court of Claims denied. *Messrs. Robert N. Miller* and *Stuart Chevalier* for petitioner. *Solicitor General Hughes, Assistant Attorney General Galloway,* and *Messrs. George C. Butte* and *McClure Kelley* for the United States. Reported below: 66 Ct. Cls. 456.

No. 152. HUCKINS *v.* SMITH, TRUSTEE IN BANKRUPTCY. October 14, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Frank S. Quinn* for petitioner. *Mr. Will Steel* for respondent. Reported below: 29 F. (2d) 907.

No. 153. UNITED STATES EX REL. AMERICAN SILVER PRODUCERS ASS'N ET AL. *v.* MELLON, SECRETARY OF THE TREASURY, ET AL. October 14, 1929. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Messrs. Charles S. Thomas, J. Harry Covington, George K. Thomas,* and *Spencer Gordon* for petitioners. *Solicitor General Hughes, Assistant Attorney General Farnum,* and *Mr. John T. Fowler, Jr.,* for respondents. Reported below: 32 F. (2d) 415.

No. 154. AMERICAN SURETY CO. *v.* BLOUNT COUNTY BANK. October 14, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Douglas Arant* for petitioner. No appearance for respondent. Reported below: 30 F. (2d) 882.

No. 155. SHICK *v.* GOODMAN, TRUSTEE. October 14, 1929. Petition for writ of certiorari to the Circuit Court

of Appeals for the Third Circuit denied. *Mr. Robert P. Shick* for petitioner. *Mr. Caleb J. Bieber* for respondent. Reported below: 33 F. (2d) 291.

No. 156. SCHEFMAN ET AL. *v.* DE GROOT, TRUSTEE. October 14, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Clare J. Hall* for petitioners. No appearance for respondent. Reported below: 35 F. (2d) 950.

No. 157. TRINIDAD ASPHALT MFG. CO. *v.* WESTERN WILLITE CO. ET AL. October 14, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Howard G. Cook* for petitioner. *Messrs. S. Mayner Wallace, Gurney E. Newlin,* and *George Eigel* for respondents. Reported below: 32 F. (2d) 487.

No. 158. FIDELITY & DEPOSIT CO. OF MARYLAND *v.* BURDEN; and

No. 159. SAME *v.* SAME. October 14, 1929. Petitions for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Joseph F. Murray* for petitioner. *Mr. Charles S. Aronstam* for respondent. Reported below: 30 F. (2d) 610.

No. 160. GILL *v.* SMITH. October 14, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Carey Van Fleet* for petitioner. *Mr. Malcolm McAvoy* for respondent. Reported below: 31 F. (2d) 396.

No. 161. JONESBORO GROCER CO. *v.* UNITED STATES. October 14, 1929. Petition for writ of certiorari to the Court of Claims denied. *Mr. Donald Horne* for peti-

tioner. *Solicitor General Hughes, Assistant Attorney General Galloway,* and *Messrs. George C. Butte* and *Charles R. Pollard* for the United States. Reported below: 66 Ct. Cls. 320.

No. 162. GAMBLE, RECEIVER, *v.* DARRAGH. October 14, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. P. A. Lasley* and *H. M. Trieber* for petitioner. *Messrs. Ashley Cockrill* and *H. M. Armistead* for respondent. Reported below: 31 F. (2d) 906.

No. 163. MIMNAUGH *v.* UNITED STATES. October 21, 1929. Petition for writ of certiorari to the Court of Claims denied. *Mr. L. L. Hamby* for petitioner. *Solicitor General Hughes, Assistant Attorney General Galloway,* and *Messrs. Henry A. Cox* and *W. Marvin Smith* for the United States. Reported below: 66 Ct. Cls. 411.

No. 166. RAMSEY ET AL. *v.* CITY OF OXFORD ET AL. October 21, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. John J. Jones, B. R. Leydig,* and *K. M. Geddes* for petitioners. *Messrs. W. A. Ayres, Austin M. Cowan,* and *Chester I. Long* for respondents. Reported below: 32 F. (2d) 134.

No. 168. LONG ET AL. *v.* AMERICAN RAILWAY EXPRESS CO. October 21, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Beeman Strong* and *Will E. Orgain* for petitioners. *Mr. Palmer Hutcheson* for respondent. Reported below: 30 F. (2d) 571.

No. 170. UNITED STATES *v.* MIDDLEBROOK, RECEIVER. October 21, 1929. Petition for writ of certiorari to the Court of Claims denied. *Solicitor General Hughes* and *Assistant Attorney General Galloway* for the United States. *Messrs. C. C. Carlin, M. Carter Hall,* and *Leslie C. Garnett* for respondent. Reported below: 67 Ct. Cls. 294.

No. 171. CLEVELAND, C., C. & ST. L. R. Co. *v.* KEPNER. October 21, 1929. Petition for writ of certiorari to the Supreme Court of Missouri denied. *Messrs. Charles A. Houts, S. W. Baxter,* and *H. N. Quigley* for petitioner. *Mr. Patrick J. Cullen* for respondent. Reported below: 15 S. W. (2d) 825.

No. 172. NEW YORK LIFE INS. Co. *v.* GITS. October 21, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Homer H. Cooper, Samuel Topliff,* and *Louis H. Cooke* for petitioner. *Mr. Daniel M. Dever* for respondent. Reported below: 32 F. (2d) 7.

No. 174. BOERA ET AL. *v.* THE BUCKLEIGH ET AL. October 21, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Frank I. Finkler* for petitioners. *Messrs. L. de Grove Potter* and *Charles Burlingham* for respondents. Reported below: 31 F. (2d) 241.

No. 175. BURNS ET AL. *v.* LUCAS, COMMISSIONER OF INTERNAL REVENUE. October 21, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Joseph F. Murray* for petitioners. *Solicitor General Hughes,* and *Messrs. Randolph C. Shaw* and *John Vaughan Groner* for respondent. Reported below: 31 F. (2d) 399.

No. 176. DIBBLE *v.* UNADILLA VALLEY R. Co. October 21, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. David F. Lee* for petitioner. *Mr. Merritt Bridges* for respondent. Reported below: 31 F. (2d) 239.

No. 177. WOLBER *v.* FORD MOTOR Co. October 21, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Harold A. Smith* for petitioner. *Messrs. Clifford B. Longley* and *George T. Buckingham* for respondent. Reported below: 32 F. (2d) 18.

No. 178. CADE *v.* HOLT ET AL. October 21, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. W. T. Armstrong* for petitioner. No appearance for respondents. Reported below: 32 F. (2d) 260.

No. 180. BURKETT *v.* LUCAS, COMMISSIONER OF INTERNAL REVENUE. October 21, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. J. W. House* and *C. H. Moses* for petitioner. *Solicitor General Hughes*, and *Messrs. Howard T. Jones* and *Morton P. Fisher* for respondent. Reported below: 31 F. (2d) 667.

No. 181. HENSHAW *v.* LUCAS, COMMISSIONER OF INTERNAL REVENUE. October 21, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Allen L. Chickering* and *Walter C. Fox, Jr.*, for petitioner. *Solicitor General Hughes*, and *Messrs. Sewall Key* and *John Vaughan Groner* for respondent. Reported below: 31 F. (2d) 946.

No. 182. GREYLOCK MILLS *v.* LUCAS, COMMISSIONER OF INTERNAL REVENUE. October 21, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Sanford Robinson* for petitioner. *Solicitor General Hughes*, and *Messrs. Sewall Key* and *Millar E. McGilchrist* for respondent. Reported below: 31 F. (2d) 655.

No. 185. TRACY WALDRON FRUIT CO. *v.* SOUTHERN PACIFIC CO. October 21, 1929. Petition for writ of certiorari to the District Court of Appeals, First Appellate District, State of California, denied. *Mr. R. F. Gaines* for petitioner. *Mr. Henley C. Booth* for respondent. Reported below: 274 Pac. 411.

No. 186. PAINLESS PARKER DENTIST *v.* COLORADO. October 21, 1929. Petition for writ of certiorari to the Supreme Court of Colorado denied. *Mr. J. S. Breitenstein* for petitioner. *Mr. Charles H. Haines* for respondent. Reported below: 275 Pac. 928.

No. 187. JUDICE CO., INC., ET AL. *v.* VILLAGE OF SCOTT. October 21, 1929. Petition for writ of certiorari to the Supreme Court of Louisiana denied. *Mr. Harry McCall* for petitioners. No appearance for respondent. Reported below: 121 So. 592.

No. 189. MCMULLEN *v.* LEWIS ET AL. October 21, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. Henry Simms* and *Wm. Bullitt Dixon* for petitioner. *Messrs. George E. Price* and *Robert S. Spillman* for respondents. Reported below: 32 F. (2d) 481.

No. 192. SOUTHERN PACIFIC CO. *v.* UNITED STATES. October 21, 1929. Petition for writ of certiorari to the Court of Claims denied. *Messrs. Wm. R. Harr* and *Charles H. Bates* for petitioner. *Solicitor General Hughes, Assistant Attorney General Galloway,* and *Messrs. Claude R. Branch, George C. Butte,* and *Louis R. Mehlinger* for the United States. Reported below: 67 Ct. Cls. 414.

No. 194. HEBERT *v.* FIRST NATIONAL BANK OF ABBEVILLE. October 21, 1929. Petition for writ of certiorari to the Supreme Court of Louisiana denied. *Mr. Charles A. McCoy* for petitioner. *Mr. Philip S. Pugh* for respondent. Reported below: 121 So. 598.

No. 195. WOODLIFF *v.* CITIZENS BUILDING & REALTY CO. ET AL. October 21, 1929. Petition for writ of certiorari to the Supreme Court of Michigan denied. *Mr. Richard S. Woodliff, pro se,* for petitioner. *Mr. Larry S. Davidow* for respondents. Reported below: 245 Mich. 292.

No. 196. CHICAGO, ROCK ISLAND & PACIFIC R. CO. *v.* TALBERT. October 21, 1929. Petition for writ of certiorari to the Supreme Court of Missouri denied. *Messrs. M. L. Bell, W. F. Dickinson, Luther Burns, Henry S. Conrad, L. E. Durham,* and *Thomas P. Littlepage* for petitioner. *Mr. Horace Guffin* for respondent. Reported below: 15 S. W. (2d) 762.

No. 197. PUBLIC SERVICE COMMISSION OF INDIANA ET AL. *v.* VINCENNES WATER SUPPLY CO. October 21, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Arthur L.*

Gilliom and *James M. Ogden* for petitioners. *Mr. Clyde H. Jones* for respondent. Reported below: 34 F. (2d) 5.

No. 201. FRANK MILLER CO. *v.* BASSICK MFG. CO. October 21, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Frank S. Busser* for petitioner. *Mr. Lynn A. Williams* for respondent. Reported below: 31 F. (2d) 112.

No. 202. BOSARGE ET AL. *v.* ALABAMA. October 21, 1929. Petition for writ of certiorari to the Court of Appeals of Alabama denied. *Mr. Harry H. Smith* for petitioners. *Mr. Charlie C. McCall* for respondent. Reported below: 121 So. 427.

No. 203. MONONGAHELA WEST PENN PUBLIC SERVICE CORP'N *v.* ALBEY. October 21, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Lawrence R. Pugh* for petitioner. *Mr. Roy N. Merryman* for respondent. Reported below: 31 F. (2d) 85.

No. 204. MISSOURI PACIFIC R. CO. *v.* WHEELER. October 21, 1929. Petition for writ of certiorari to the Supreme Court of Missouri denied. *Messrs. Edward J. White* and *Harry R. Stocker* for petitioner. *Mr. W. H. Douglass* for respondent. Reported below: 18 S. W. (2d) 494.

No. 205. FORT DODGE, DES MOINES & SOUTHERN R. CO. *v.* YARN. October 21, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth

Circuit denied. *Messrs. James C. Davis* and *A. A. McLaughlin* for petitioner. *Mr. Donald Evans* for respondent. Reported below: 31 F. (2d) 717.

No. 207. MORRISETTE *v.* BOULEVARD BRIDGE CORP'N. October 21, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Claudian B. Northrop* for petitioner. *Mr. E. Randolph Williams* for respondent. Reported below: 30 F. (2d) 290.

No. 208. RICHMOND SCREW ANCHOR CO., INC., *v.* UNITED STATES. October 21, 1929. Petition for writ of certiorari to the Court of Claims denied. *Messrs. O. Ellery Edwards, Wm. Houston Kenyon, Archibald Cox, Joseph W. Cox, Douglas H. Kenyon,* and *F. M. Sheffield* for petitioner. *Solicitor General Hughes, Assistant Attorney General Galloway,* and *Messrs. George C. Butte* and *Henry A. Cox* for the United States. Reported below: 67 Ct. Cls. 63.

No. 209. LOUISVILLE & NASHVILLE R. CO. *v.* BUSH. October 21, 1929. Petition for writ of certiorari to the Supreme Court of Missouri denied. *Messrs. Ashby M. Warren* and *Harold R. Small* for petitioner. *Messrs. Thomas T. Fauntleroy* and *P. H. Cullen* for respondent. Reported below: 17 S. W. (2d) 337.

No. 210. GAINESVILLE *v.* BROWN-CRUMMER INVESTMENT CO. October 21, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. W. O. Davis* for petitioner. *Messrs. John T.*

Suggs, James G. Martin, Rhodes S. Baker, Alex. F. Weisberg, and *F. C. Dillard* for respondent. Reported below: 31 F. (2d) 1009.

No. 211. READ *v.* WILBUR, SECRETARY OF THE INTERIOR. October 21, 1929. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. Charles R. Pierce* for petitioner. *Solicitor General Hughes,* and *Messrs. Seth W. Richardson, Claude R. Branch,* and *Perry G. Michener* for respondent. Reported below: 32 F. (2d) 413.

No. 213. KALES *v.* WOODWORTH. October 21, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Hal H. Smith* and *Archibald Broomfield* for petitioner. *Solicitor General Hughes,* and *Messrs. Sewall Key* and *J. Louis Monarch* for respondent. Reported below: 32 F. (2d) 37.

No. 214. UNITED STATES EX REL. CONSTANTINO *v.* KARNUTH, DISTRICT DIRECTOR OF IMMIGRATION, ET AL. October 21, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Irving W. Cole* for petitioner. *Solicitor General Hughes, Assistant Attorney General Luhring,* and *Mr. Harry S. Ridgely* for the United States. Reported below: 31 F. (2d) 1022.

No. 215. REYNOLDS MORTGAGE CO. *v.* ABRAHAM LINCOLN LIFE INS. CO. October 21, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Ernest May* for petitioner. *Mr. J. H. Barwise* for respondent. Reported below: 30 F. (2d) 790.

No. 216. OWENS *v.* HUDSON. October 21, 1929. Petition for writ of certiorari to the Court of Appeals, Eighth Judicial District, Cuyahoga County, State of Ohio, denied. *Mr. Alexander H. Martin* for petitioner. *Mr. James C. Waters, Jr.*, for respondent.

No. 217. DET FORENEDE DAMPSKIBS SELSKAB *v.* INSURANCE COMPANY OF NORTH AMERICA. October 21, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Ira A. Campbell* for petitioner. *Messrs. D. Roger Englar* and *Oscar R. Houston* for respondent. Reported below: 31 F. (2d) 658.

No. 218. ROSENBERG ET AL. *v.* UNITED STATES. October 21, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Nat Schmulowitz* for petitioners. *Solicitor General Hughes, Assistant Attorney General Galloway* and *Mr. Claude R. Branch* for the United States. Reported below: 31 F. (2d) 838.

No. 219. LYNCH *v.* INTERNATIONAL BANKING CORP'N. October 21, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. A. A. DeLigne* and *A. E. Shaw* for petitioner. *Mr. Marcel E. Cerf* for respondent. Reported below: 31 F. (2d) 942.

No. 220. GENERAL ELECTRIC CO. ET AL. *v.* ROBERTSON, COMMISSIONER OF PATENTS. October 21, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. Harrison F. Lyman, Frederick P. Fish,* and *Charles E. Tullar* for petitioners.

Solicitor General Hughes, Assistant Attorney General Galloway, and *Messrs. Claude R. Branch* and *Harry E. Knight* for respondent. Reported below: 32 F. (2d) 495.

No. 221. ROYAL BAKING POWDER CO. *v.* FEDERAL TRADE COMM'N ET AL. October 21, 1929. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Messrs. Matthew E. O'Brien* and *Matthew H. O'Brien* for petitioner. *Solicitor General Hughes* and *Messrs. Claude R. Branch, Robert E. Healy, Adrien F. Busick,* and *Martin A. Morrison* for respondents. Reported below: 32 F. (2d) 966.

No. 224. JOHNSON-WENTWORTH CO. *v.* MCDONOUGH. October 21, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Charles Neave* for petitioner. *Mr. Amasa C. Paul* for respondent. Reported below: 30 F. (2d) 375.

No. 225. BODKIN *v.* UNITED STATES. October 21, 1929. Petition for writ of certiorari to the Court of Claims denied. *Mr. Patrick H. Loughran* for petitioner. *Solicitor General Hughes, Assistant Attorney General Galloway,* and *Messrs. George C. Butte* and *J. Robert Anderson* for the United States. Reported below: 67 Ct. Cls. 281.

No. 227. ILLINOIS COAL CORP'N *v.* AMERICAN MINE EQUIPMENT CO. ET AL.; and

No. 228. SAME *v.* SAME. October 21, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. S. O. Levinson* and

Benjamin V. Becker for petitioner. *Messrs. Silas H. Strawn, Lawrence T. Allen, Bertram F. Shipman, Gilbert E. Porter,* and *Edward K. Hanlon* for respondents. Reported below: 31 F. (2d) 507.

No. 230. TEXAS POWER & LIGHT CO. *v.* FAIRBANKS, MORSE & CO. October 21, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Joe A. Worsham* for petitioner. *Messrs. B. L. Agerton* and *Allen Wight* for respondent. Reported below: 32 F. (2d) 693.

No. 231. TEXAS ELECTRIC SERVICE CO. *v.* FAIRBANKS, MORSE & CO. October 21, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Joe A. Worsham* for petitioner. *Messrs. B. L. Agerton* and *Allen Wight* for respondent. Reported below: 32 F. (2d) 696.

No. 233. RINGLING TRUST & SAVINGS BANK ET AL. *v.* WHITFIELD ESTATES, INC. October 21, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Herbert Sawyer* for petitioners. *Messrs. John C. Cooper* and *H. P. Adair* for respondent. Reported below: 32 F. (2d) 92.

No. 234. MARRS ET AL. *v.* CITY OF OXFORD ET AL. October 21, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Harry W. Hart* for petitioners. *Messrs. W. A. Ayres, Austin M. Cowan,* and *Chester I. Long* for respondents. Reported below: 32 F. (2d) 134.

No. 236. BRITAIN STEAMSHIP CO., LTD., *v.* MUNSON STEAMSHIP LINE. October 21, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Charles R. Hickox* for petitioner. *Mr. Mark W. Maclay* for respondent. Reported below: 31 F. (2d) 530.

No. 239. AMERICAN SALES CORP'N *v.* UNITED STATES. October 21, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. T. W. Gregory* and *James W. Wayman* for petitioner. *Solicitor General Hughes, Assistant Attorney General Galloway,* and *Mr. Claude R. Branch* for the United States. Reported below: 32 F. (2d) 141.

No. 240. PENNSYLVANIA R. CO. *v.* LUTTON. October 21, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Frederic D. McKenney, Union C. DeFord,* and *Norman A. Emery* for petitioner. *Mr. John Ruffalo* for respondent. Reported below: 29 F. (2d) 689.

No. 241. NAVIGAZIONE LIBERA TRIESTINA, S. A., *v.* ROBINS DRYDOCK & REPAIR CO. October 21, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Homer L. Loomis* for petitioner. *Messrs. E. Curtis Rouse* and *Harold Harper* for respondent. Reported below: 32 F. (2d) 209.

No. 242. TRANSOCEANICA SOCIETA ITALIANA DI NAVIGAZIONE *v.* PATENT VULCANITE ROOFING CO. October 21, 1929. Petition for writ of certiorari to the Circuit Court

of Appeals for the Second Circuit denied. *Mr. Homer L. Loomis* for petitioner. *Messrs. D. Roger Englar* and *Arthur W. Clement* for respondent. Reported below: 32 F. (2d) 213.

No. 243. FREEMAN *v.* HOPKINS. October 21, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. James Henry Longden* for petitioner. No appearance for respondent. Reported below: 32 F. (2d) 756.

No. 244. MAHIN *v.* POSITYPE CORP'N. October 21, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Caruthers Ewing* for petitioner. *Mr. R. Randolph Hicks* for respondent. Reported below: 32 F. (2d) 202.

No. 246. HOWARD ET AL. *v.* WEISSMAN ET AL. October 21, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Robert N. Golding* and *Weymouth Kirkland* for petitioners. *Mr. Frank C. Dailey* for respondents. Reported below: 31 F. (2d) 689.

No. 249. LONSDALE *v.* LUCAS, COMMISSIONER OF INTERNAL REVENUE. October 21, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Robert A. Littleton* for petitioner. *Solicitor General Hughes* and *Messrs. Claude R. Branch* and *Sewall Key* for respondent. Reported below: 32 F. (2d) 537.

No. 251. ROCKWOOD CORPORATION *v.* BRICKLAYER'S LOCAL UNION NO. 1 ET AL. October 21, 1929. Petition

for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Mat J. Holland* and *George Eigel* for petitioner. *Messrs. T. J. Rowe* and *Thomas J. Rowe, Jr.*, for respondents. Reported below: 33 F. (2d) 25.

No. 252. HIRSCHI *v.* UNITED STATES. October 21, 1929. Petition for writ of certiorari to the Court of Claims denied. *Messrs. Wade H. Ellis* and *Don F. Reed* for petitioner. *Solicitor General Hughes, Assistant Attorney General Galloway,* and *Messrs. Lisle A. Smith* and *W. Marvin Smith* for the United States. Reported below: 67 Ct. Cls. 637.

No. 253. NEW ORLEANS BANK & TRUST CO. *v.* HART, RECEIVER. October 21, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Henry P. Dart, Jr.*, for petitioner. No appearance for respondent. Reported below: 32 F. (2d) 721.

No. 255. MISSOURI PACIFIC R. CO. *v.* CROUCH. October 21, 1929. Petition for writ of certiorari to the Supreme Court of Kansas denied. *Messrs. W. P. Waggener* and *J. M. Challiss* for petitioner. *Mr. T. S. Salathiel* for respondent. Reported below: 128 Kan. 26.

No. 256. JOHNSON *v.* MCCLOUD. October 21, 1929. Petition for writ of certiorari to the Supreme Court of Florida denied. *Mr. Giles J. Patterson* for petitioner. *Messrs. Wm. E. Kay, Thomas B. Adams,* and *J. T. G. Crawford* for respondent. Reported below: 121 So. 574.

No. 257. PERRY *v.* CAPITAL TRACTION CO.; and

No. 258. SAME *v.* SAME. October 21, 1929. Petition for writs of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. Hyman M. Goldstein* for petitioner. *Messrs. Frank J. Hogan* and *Edmund L. Jones* for respondent. Reported below: 32 F. (2d) 938.

No. 259. MATTHIESSEN *v.* UNITED STATES. October 21, 1929. Petition for writ of certiorari to the Court of Claims denied. *Messrs. M. F. Gallagher* and *Samuel M. Rinaker* for petitioner. *Solicitor General Hughes, Assistant Attorney General Galloway,* and *Mr. Fred Dyar* for the United States. Reported below: 67 Ct. Cls. 571.

No. 260. SOUTHERN SURETY CO. ET AL. *v.* COMMERCIAL CASUALTY INS. CO. ET AL. October 21, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. James L. Parrish* and *Donald Thompson* for petitioners. *Mr. John M. Freeman* for respondents. Reported below: 31 F. (2d) 817.

No. 262. OSAGE COUNTY MOTOR CO. *v.* UNITED STATES. October 21, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Charles B. Wilson, Jr.,* for petitioner. *Solicitor General Hughes* and *Messrs. Seth W. Richardson, Claude R. Branch,* and *Pedro Capo-Rodriguez* for the United States. Reported below: 33 F. (2d) 21.

No. 263. EMMONS COAL MINING CORP'N ET AL. *v.* SIR R. ROPNER & CO., LTD. October 21, 1929. Petition for writ

of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. J. T. Manning, Jr.*, for petitioners. *Messrs. H. Alan Dawson* and *Roscoe H. Hupper* for respondent. Reported below: 31 F. (2d) 948.

No. 264. OHIO EX REL. MOOCK *v.* CINCINNATI ET AL; and

No. 265. MOOCK *v.* CINCINNATI. October 21, 1929. Petition for writs of certiorari to the Supreme Court of Ohio denied. *Messrs. Province M. Pogue* and *Thomas L. Pogue* for petitioner. *Messrs. John D. Ellis, Ralph A. Kreimer,* and *Wm. E. Hess* for respondents. Reported below: 120 Ohio St. 500.

No. 266. THACKER *v.* KENTUCKY. October 21, 1929. Petition for writ of certiorari to the Court of Appeals of Kentucky denied. *Mr. Gardner K. Byers* for petitioner. *Messrs. J. W. Cammack* and *Samuel B. Kirby, Jr.*, for respondent. Reported below: 16 S. W. (2d) 448.

No. 268. MATTHEW *v.* UNION CENTRAL LIFE INS. CO. October 21, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Andrew T. Matthew, pro se,* for petitioner. *Mr. F. Eldred Boland* for respondent. Reported below: 32 F. (2d) 97; 33 F. (2d) 899.

No. 271. AKTIESELSKABET DAMPSKIB GANSFJORD ET AL. *v.* UNITED STATES. October 21, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. John D. Grace* for petitioners. *Solicitor General Hughes, Assistant Attorney General Farnum,* and *Messrs. Claude R. Branch* and *J. Frank Staley* for the United States. Reported below: 32 F. (2d) 236.

No. 272. CHICAGO FROG & SWITCH CO. *v.* UNITED STATES. October 21, 1929. Petition for writ of certiorari to the Court of Claims denied. *Messrs. Karl D. Loos, E. Barrett Prettyman,* and *Preston B. Kavanaugh* for petitioner. *Solicitor General Hughes, Assistant Attorney General Galloway,* and *Messrs. Claude R. Branch* and *George H. Foster* for the United States. Reported below: 67 Ct. Cls. 662.

No. 273. KUNGLIG JARNVAGSSTYRELSEN *v.* DEXTER & CARPENTER, INC. October 21, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. J. Harry Covington, Edward B. Burling, Gustav Lange, Jr.,* and *Newell W. Ellison* for petitioner. *Mr. Charles S. Haight* for respondent. Reported below: 32 F. (2d) 195.

No. 274. GRAFF ET AL. *v.* WALLACE ET AL. October 21, 1929. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Messrs. Harry S. Barger* and *Frank Stetson* for petitioners. *Mr. Victor H. Wallace* for respondents. Reported below: 32 F. (2d) 960.

No. 277. CADY, SCHAPIRO & SCHAPIRO ET AL. *v.* M. D. MIRSKY & CO. October 21, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. David Haar* for petitioners. *Mr. David W. Kahn* for respondent. Reported below: 32 F. (2d) 676.

No. 278. CRACKER JACK CO. *v.* UNITED STATES. October 21, 1929. Petition for writ of certiorari to the Court of Claims denied. *Mr. George E. Holmes* for petitioner. *Solicitor General Hughes, Assistant Attorney General*

Galloway, and *Messrs. George C. Butte* and *George H. Foster* for the United States. Reported below: 67 Ct. Cls. 89, 98.

No. 279. CRACKER JACK CO., INC., *v.* UNITED STATES. October 21, 1929. Petition for writ of certiorari to the Court of Claims denied. *Mr. George E. Holmes* for petitioner. *Solicitor General Hughes, Assistant Attorney General Galloway,* and *Messrs. George C. Butte* and *George H. Foster* for the United States. Reported below: 67 Ct. Cls. 89, 98.

No. 280. SHOTWELL MFG. CO. *v.* UNITED STATES. October 21, 1929. Petition for writ of certiorari to the Court of Claims denied. *Mr. George E. Holmes* for petitioner. *Solicitor General Hughes, Assistant Attorney General Galloway,* and *Messrs. George C. Butte* and *George H. Foster* for the United States. Reported below: 67 Ct. Cls. 152.

No. 283. LORENZ ET AL. *v.* MABON ET AL. October 21, 1929. Petition for writ of certiorari to the Supreme Court of Mississippi denied. *Messrs. Wm. H. Watkins* and *W. Lee Guice* for petitioners. *Messrs. Benjamin B. Taylor, Charles V. Porter,* and *Joseph A. Loret* for respondents. Reported below: 122 So. 104.

No. 284. DAVIS, TRUSTEE IN BANKRUPTCY, *v.* MABEE ET AL. October 21, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. George W. Ritter, D. F. Melhorne,* and *E. J. Marshall* for petitioner. *Messrs. James H. Boyd, pro se,* and *Charles A. Thatcher, pro se,* for respondents. Reported below: 32 F. (2d) 502.

No. 286. HOOSIER CASUALTY CO. *v.* LUCAS, COMMISSIONER OF INTERNAL REVENUE. October 21, 1929. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Messrs. Robert A. Littleton* and *W. W. Spalding* for petitioner. *Solicitor General Hughes,* and *Messrs. Claude R. Branch* and *Sewall Key* for respondent. Reported below: 32 F. (2d) 940.

No. 287. DODD *v.* UNION INDEMNITY CO. October 21, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Hiram M. Smith* for petitioner. *Mr. Frank H. Atwill* for respondent. Reported below: 32 F. (2d) 512.

No. 288. PARDEE ET AL. *v.* HOWCOTT ET AL.; and

No. 289. PARDEE COMPANY *v.* SAME. October 21, 1929. Petitions for writs of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. John May* and *Russell Duane* for petitioners. *Messrs. Wm. Winans Wall* and *Hugh S. Suthon* for respondents. Reported below: 32 F. (2d) 81.

No. 290. ROSENSTEIN ET AL. *v.* UNITED STATES. October 21, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. David P. Siegel* for petitioners. *Solicitor General Hughes, Assistant Attorney General Luhring,* and *Messrs. Claude R. Branch* and *Harry S. Ridgely* for the United States. Reported below: 34 F. (2d) 630.

No. 291. CLINTON CORN SYRUP REFINING CO. *v.* UNITED STATES. October 21, 1929. Petition for writ of certiorari to the Court of Claims denied. *Mr. Richard S. Doyle* for petitioner. *Solicitor General Hughes, Assist-*

ant Attorney General Galloway, and *Messrs. Claude R. Branch* and *R. C. Williamson* for the United States. Reported below: 67 Ct. Cls. 711.

No. 292. NATIONAL CANDY CO. *v.* UNITED STATES. October 21, 1929. Petition for writ of certiorari to the Court of Claims denied. *Mr. Richard S. Doyle* for petitioner. *Solicitor General Hughes, Assistant Attorney General Galloway,* and *Messrs. Claude R. Branch* and *R. C. Williamson* for the United States. Reported below: 67 Ct. Cls. 74.

No. 293. FORT DODGE, DES MOINES & SOUTHERN R. CO. *v.* UNITED STATES. October 21, 1929. Petition for writ of certiorari to the Court of Claims denied. *Messrs. R. E. Lee Marshall* and *James W. Carmalt* for petitioner. *Solicitor General Hughes, Assistant Attorney General Galloway,* and *Messrs. Claude R. Branch* and *Lisle A. Smith* for the United States. Reported below: 67 Ct. Cls. 708.

No. 297. MISSOURI PACIFIC R. CO. *v.* KOONSE. October 21, 1929. Petition for writ of certiorari to the Supreme Court of Missouri denied. *Messrs. Merritt U. Hayden* and *Edward J. White* for petitioner. *Mr. David W. Hill* for respondent. Reported below: 18 S. W. (2d) 467.

No. 298. S. NAITOVE & CO., INC., *v.* LUCAS, COMMISSIONER OF INTERNAL REVENUE. October 21, 1929. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Messrs. Robert E. Caulson, R. Kemp Slaughter,* and *Hugh C. Bickford* for petitioner. *Solicitor General Hughes* and *Mr. Claude R. Branch* for respondent. Reported below: 32 F. (2d) 949.

No. 299. BICKETT COAL & COKE CO. *v.* UNITED STATES. October 21, 1929. Petition for writ of certiorari to the Court of Claims denied. *Messrs. Jerry A. Mathews, Josephus C. Trimble,* and *Horace S. Whitman* for petitioner. *Solicitor General Hughes, Assistant Attorney General Galloway,* and *Messrs. Claude R. Branch, W. Marvin Smith,* and *J. Robert Anderson* for the United States. Reported below: 67 Ct. Cls. 53.

No. 302. CONNER ET AL. *v.* CORNELL ET AL. October 21, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Wm. Neff* for petitioners. *Messrs. W. H. Francis, John Rogers, Leonard A. Lytle, B. B. Blakeney,* and *Hubert Armbrister* for respondents. Reported below: 32 F. (2d) 581.

No. 304. PRATT CHUCK COMPANY *v.* CRESCENT INSULATED WIRE & CABLE CO. October 21, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Robert B. Honeyman* for petitioner. *Mr. Allen S. Hubbard* for respondent. Reported below: 33 F. (2d) 269.

No. 306. COOK *v.* UNITED STATES. October 21, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Allen W. Comstock* for petitioner. *Solicitor General Hughes, Assistant Attorney General Luhring,* and *Mr. Harry S. Ridgely* for the United States. Reported below: 33 F. (2d) 509.

No. 308. KRAUTHOFF *v.* KANSAS CITY JOINT STOCK LAND BANK. October 21, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth

Circuit denied. *Messrs. Edwin A. Krauthoff* and *Price Wickersham* for petitioner. *Messrs. Cyrus Crane* and *E. F. Halstead* for respondent. Reported below: 31 F. (2d). 75.

No. 310. Ross et al. *v.* White, Trustee. October 21, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. John A. Pitts* and *E. W. Ross* for petitioners. *Mr. C. E. Pigford* for respondent. Reported below: 32 F. (2d) 750.

No. 312. Clements, Trustee in Bankruptcy, *v.* Conyers, Receiver. October 21, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Wm. M. Acton* and *T. Morton McDonald* for petitioner. *Mr. Isidor Kahn* for respondent. Reported below: 32 F. (2d) 5.

No. 313. Boston & Maine R. Co. *v.* Watkins. October 21, 1929. Petition for writ of certiorari to the Supreme Court of New Hampshire denied. *Mr. Wm. N. Rogers* for petitioner. *Mr. John E. Benton* for respondent. Reported below: 146 Atl. 865.

No. 315. Universal Insurance Co. *v.* Gulf Refining Co. October 21, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. D. Roger Englar* for petitioner. *Mr. Van Vechten Veeder* for respondent. Reported below: 32 F (2d) 555.

No. 316. Murphy *v.* United States. October 21, 1929. Petition for writ of certiorari to the Circuit Court

of Appeals for the Third Circuit denied. *Mr. Wm. A. Gray* for petitioner. *Solicitor General Hughes* and *Mr. John J. Byrne* for the United States. Reported below: 33 F. (2d) 896.

No. 317. PACIFIC IMPROVEMENT CO. *v.* PITTSBURGH, SHAWMUT & NORTHERN R. CO. ET AL. October 21, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. Adelbert Moot* and *John G. Buchanan* for petitioner. *Messrs. J. Merrill Wright* and *Edwin E. Tait* for respondents. Reported below: 33 F. (2d) 505.

No. 318. OSTRANDER-SEYMOUR CO. *v.* GRAND RAPIDS ELECTROTYPE CO. October 21, 1929. Petition for writ of certiorari to the Supreme Court of Michigan denied. *Messrs. Stuart E. Knappen* and *Meyer Abrams* for petitioner. *Mr. Ben M. Corwin* for respondent. Reported below: 245 Mich. 669.

No. 319. BURKE ET AL. *v.* SANITARY DISTRICT OF CHICAGO ET AL. October 21, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. John M. Zane* for petitioners. *Messrs. Edmund D. Adcock* and *James M. Sheehan* for respondents. Reported below: 32 F. (2d) 27.

No. 320. APFEL ET AL. *v.* MELLON ET AL. October 21, 1929. Petition for writ of certiorari to the Court of Appeals for the District of Columbia denied. *Mr. Vernon E. West* for petitioners. *Solicitor General Hughes, Assistant Attorney General Farnum,* and *Messrs. Walter Wyatt* and *Newton D. Baker* for respondents. Reported below: 33 F. (2d) 805.

No. 321. ASCHENBACH *v.* SULLIVAN MINING CO. October 21, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. James A. Williams* for petitioner. *Mr. Frank T. Post* for respondent. Reported below: 33 F. (2d) 1.

No. 322. HUBER HOGE, INC. *v.* SMITH & WESSON, INC. October 21, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Messrs. Alfred Bennett* and *Powell Crichton* for petitioner. *Mr. Robert C. Cooley* for respondent. Reported below: 32 F. (2d) 699.

No. 325. RICHARDSON *v.* LOUISVILLE & NASHVILLE R. CO. October 21, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Ike W. Crabtree* for petitioner. *Messrs. John B. Keeble* and *Henry J. Livingston* for respondent. Reported below: 34 F. (2d) 1022.

No. 327. BLACKMORE INVESTMENT CO. *v.* JOHNSON ET AL. October 21, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Grove J. Fink* for petitioner. *Mr. Albert H. Elliot* for respondents. Reported below: 32 F. (2d) 433.

No. 328. CLINE ET AL. *v.* COSDEN. October 21, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. R. L. Davidson, W. I. Williams,* and *Nathan Newby* for petitioners. *Messrs. James C. Denton* and *Henry M. Gray* for respondent. Reported below: 26 F. (2d) 631; 32 F. (2d) 1003.

No. 330. PHILLIPS *v.* CHICAGO & NORTHWESTERN R. Co. October 21, 1929. Petition for writ of certiorari to the Supreme Court of Minnesota denied. *Messrs. F. M. Miner* and *M. H. Boutelle* for petitioner. *Messrs. Wm. T. Faricy* and *Samuel H. Cady* for respondent. Reported below: 225 N. W. 106.

No. 331. SOUTHERN CALIFORNIA UTILITIES, INC., *v.* CITY OF HUNTINGTON PARK. October 21, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Paul Overton* for petitioner. *Mr. Wm. E. Evans* for respondent. Reported below: 32 F. (2d) 868.

No. 332. HURLEY ET AL., TRUSTEES, *v.* ILLINOIS POWER & LIGHT CORP. October 21, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Walter H. Saunders, John S. Leahy,* and *Robert Stone* for petitioners. *Messrs. Thomas F. Doran* and *T. M. Pierce* for respondent. Reported below: 30 F. (2d) 905.

No. 333. DUGAN *v.* LOGAN ET AL. October 21, 1929. Petition for writ of certiorari to the Court of Appeals of Kentucky denied. *Mr. A. O. Stanley* for petitioner. *Messrs. M. M. Logan* and *John L. Stout* for respondents. Reported below: 229 Ky. 5.

No. 335. HABERMEL, TRUSTEE, *v.* MONG ET AL. October 21, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Gardner K. Byers* and *William Marshall Bullitt* for petitioner. *Mr. Charles M. Seymour* for respondents. Reported below: 31 F. (2d) 822.

No. 337. SOUTHERN CALIFORNIA EDISON CO. *v.* RAILROAD COMMISSION OF CALIFORNIA ET AL. October 21, 1929. Petition for writ of certiorari to the Supreme Court of California denied. *Messrs. Roy V. Reppy, W. C. Mullendore,* and *E. W. Cunningham* for petitioner. *Messrs. Arthur T. George* and *W. B. Mathews* for respondents.

No. 342. CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC R. CO. *v.* KANE. October 21, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. A. N. Whitlock* for petitioner. *Mr. H. Lowndes Maury* for respondent. Reported below: 33 F. (2d) 866.

No. 346. SECURITY TRUST CO. ET AL. *v.* BAER. October 21, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. Max Isaac* and *James W. Ewing* for petitioners. *Messrs. J. Bernard Handlan* and *Charles J. Schuck* for respondent. Reported below: 32 F. (2d) 147; 33 F. (2d) 861.

No. 348. OHIO CLOVER LEAF DAIRY CO. *v.* LUCAS, COMMISSIONER OF INTERNAL REVENUE. October 21, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Harry J. Gerity* and *E. J. Marshall* for petitioner. *Solicitor General Hughes* and *Messrs. Sewall Key, John G. Remey,* and *W. Marvin Smith* for respondent. 34 F. (2d) 1022.

No. 354. SIMMONS CO. *v.* LUCAS, COMMISSIONER OF INTERNAL REVENUE. October 21, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Phillips Ketchum* for petitioner.

Solicitor General Hughes, and *Messrs. Claude R. Branch, J. Louis Monarch, Andrew D. Sharpe, Clarence M. Charest*, and *Allin H. Pierce* for respondent. Reported below: 33 F. (2d) 75.

No. 355. LEIKIN ET AL. *v.* UNITED STATES. October 21, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. George W. Cameron* for petitioners. *Solicitor General Hughes, Assistant Attorney General Luhring*, and *Messrs. Claude R. Branch* and *Harry S. Ridgely* for the United States. Reported below: 34 F. (2d) 92.

No. 358. HANSEN, RECEIVER, *v.* E. I. DU PONT DE NEMOURS & CO., INC. October 21, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. T. Catesby Jones* and *James W. Ryan* for petitioner. *Messrs. George H. Bond* and *Wm. H. Button* for respondent. Reported below: 33 F. (2d) 94.

No. 359. CHICAGO, ROCK ISLAND & PACIFIC R. Co. *v.* STOTTLE. October 21, 1929. Petition for writ of certiorari to the Supreme Court of Missouri denied. *Messrs. T. P. Littlepage, M. L. Bell, Luther Burns, Henry S. Conrad, Lisbon E. Durham*, and *W. F. Dickinson* for petitioner. *Messrs. John H. Atwood, Price Wickersham*, and *Oscar S. Hill* for respondent. Reported below: 18 S. W. (2d) 433.

No. 360. BEHN, MEYER & CO. *v.* SUTHERLAND, ALIEN PROPERTY CUSTODIAN, ET AL.; and

No. 371. SUTHERLAND, ALIEN PROPERTY CUSTODIAN, ET AL. *v.* BEHN, MEYER & CO. October 21, 1929. Petitions

for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Messrs. Frederic R. Coudert, J. Harry Covington, Mahlon B. Doing,* and *Spencer Gordon,* for Behn, Meyer & Company. *Solicitor General Hughes, Assistant Attorney General Farnum,* and *Mr. Claude R. Branch* for Sutherland et al. Reported below: 33 F. (2d) 643.

No. 361. FEDERAL ELECTRIC CO., INC., *v.* FLEXLUME CORP'N; and

No. 362. CHICAGO MINIATURE LAMP WORKS ET AL. *v.* SAME. October 21, 1929. Petition for writs of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Clarence E. Mehlhope* and *Drury W. Cooper* for petitioners. *Messrs. Wallace R. Lane* and *John S. Powers* for respondent. Reported below: 33 F. (2d) 412.

No. 366. SYMINGTON-ANDERSON CO. *v.* LUCAS, COMMISSIONER OF INTERNAL REVENUE. October 21, 1929. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. R. Kemp Slaughter* for petitioner. *Solicitor General Hughes* and *Mr. Sewall Key* for respondent. Reported below: 33 F. (2d) 372.

No. 367. YELLOW MOTOR CO. *v.* BRODERICK ET AL. October 21, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Lon O. Hocker* for petitioner. No appearance for respondents. Reported below: 34 F. (2d) 118.

No. 368. MCCARTHY *v.* U. S. FIDELITY & GUARANTY CO. October 21, 1929. Petition for writ of certiorari to the

Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Casper Schenk* and *W. B. Sloan* for petitioner. *Messrs. Jesse A. Miller* and *James C. Davis* for respondent. Reported below: 33 F. (2d) 7.

No. 369. UNIFORM PRINTING & SUPPLY CO. *v.* LUCAS, COMMISSIONER OF INTERNAL REVENUE. October 21, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Walter H. Eckert* for petitioner. *Solicitor General Hughes,* and *Messrs. Claude R. Branch, Sewall Key,* and *Barham R. Gary* for respondent. Reported below: 33 F. (2d) 445.

No. 376. CHICAGO, ROCK ISLAND & PACIFIC R. CO. *v.* GARRETT. October 21, 1929. Petition for writ of certiorari to the Supreme Court of Arkansas denied. *Messrs. Thomas S. Buzbee, W. F. Dickinson,* and *George B. Pugh* for petitioner. *Mr. Wm. R. Donham* for respondent. Reported below: 18 S. W. (2d) 321.

No. 377. REMINGTON RAND, INC., *v.* LUCAS, COMMISSIONER OF INTERNAL REVENUE; and

No. 378. SAME *v.* SAME. October 21, 1929. Petition for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Frederick H. Wood* and *Joseph C. White* for petitioner. *Solicitor General Hughes,* and *Messrs. Claude R. Branch, Sewall Key,* and *Andrew D. Sharpe* for respondent. Reported below: 33 F. (2d) 77.

No. 379. POLSKI ET AL. *v.* UNITED STATES. October 21, 1929. Petition for writ of certiorari to the Circuit Court

of Appeals for the Eighth Circuit denied. *Mr. E. Howard Morphy* for petitioners. *Solicitor General Hughes* and *Mr. John J. Byrne* for the United States. Reported below: 33 F. (2d) 686.

No. 380. NORTH RIVER INS. CO. *v.* BECNEL ET AL. October 21, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Walker B. Spencer* for petitioner. *Mr. A. A. Moreno* for respondents. Reported below: 33 F. (2d) 231.

No. 381. SWIFT & CO. *v.* AMERICAN TRANSPORTATION CO. ET AL.;

No. 382. ARMOUR & CO. *v.* SAME; and

No. 383. WILSON & CO., INC., *v.* SAME. October 21, 1929. Petition for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Charles R. Hickox* for petitioners. *Mr. Homer L. Loomis* for respondents. Reported below: 32 F. (2d) 1013.

No. 384. HILL ET AL. *v.* UNITED STATES; and

No. 385. KARNS *v.* SAME. October 21, 1929. Petition for writs of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Robert B. Keenan* for petitioners. *Solicitor General Hughes*, and *Messrs. Claude R. Branch* and *Mahlon D. Kiefer* for the United States. Reported below: 33 F. (2d) 489.

No. 393. BOGELMANN *v.* THE ROSEWAY. October 21, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. E. Curtis Rouse* for petitioner. *Messrs. Edward L. Logan* and *War-*

ner Pyne for respondent. Reported below: 34 F. (2d) 130.

No. 401. PITTSBURGH & WEST VIRGINIA R. Co. *v.* WHEELING & LAKE ERIE R. Co. ET AL. October 21, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. C. F. Taplin* for petitioner. *Messrs. Wm. H. Boyd, Andrew P. Martin, H. H. McKeehan,* and *George W. Cottrell* for respondents. Reported below: 33 F. (2d) 390.

No. 357. CHINNIS *v.* UNITED STATES. October 21, 1929. Petition for writ of certiorari to the Court of Claims denied. *Mr. Samuel T. Ansell* for petitioner. *Solicitor General Hughes, Assistant Attorney General Galloway,* and *Messrs. Claude R. Branch* and *M. C. Masterson* for the United States. Reported below: 67 Ct. Cls. 262.

No. 386. ALBRECHT ET AL. *v.* LOHSE ET AL. October 21, 1929. Petition for writ of certiorari to the Appellate Court of Illinois denied. *Mr. George A. Lytle* for petitioners. No appearance for respondents. 251 Ill. App. 626.

No. 387. PEARSON ET AL. *v.* HIGGINS, TRUSTEE. October 21, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. George D. Collins* for petitioners. No appearance for respondent. Reported below: 34 F. (2d) 27.

No. 391. FUKUNAGA *v.* HAWAII. October 21, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Eric Lyders*

for petitioner. *Messrs. George J. Hatfield, James F. Gilliland,* and *Francis Brooks* for respondent. Reported below: 33 F. (2d) 396.

No. 394. APPLYBE ET AL. *v.* UNITED STATES. October 21, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Harold C. Faulkner* for petitioners. *Solicitor General Hughes,* and *Messrs. Claude R. Branch, John J. Byrne, John F. Coldiron,* and *W. Marvin Smith* for the United States. Reported below: 32 F. (2d) 873; 33 F. (2d) 897.

No. 398. UNITED STATES EX REL. POWLOWEC *v.* DAY, COMMISSIONER. October 21, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Roger O'Donnell* for petitioner. *Solicitor General Hughes, Assistant Attorney General Luhring,* and *Messrs. Claude R. Branch, Harry S. Ridgely,* and *W. Marvin Smith* for the United States. Reported below: 33 F. (2d) 267.

No. 399. HENGGELER *v.* ALLEN, COLLECTOR. October 21, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. George B. Thummel* for petitioner. *Solicitor General Hughes,* and *Messrs. Claude R. Branch, Millar E. McGilchrist, Sewall Key,* and *W. Marvin Smith* for respondent. Reported below: 32 F. (2d) 69.

No. 400. BUSINESS MEN'S ASSURANCE CO. *v.* CAMPBELL. October 21, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied.

Mr. Egbert F. Halstead for petitioner. *Mr. Charles E. Feirich* for respondent. Reported below: 32 F. (2d) 995.

No. 404. BAMSEY *v.* IOWA. October 21, 1929. Petition for writ of certiorari to the Supreme Court of Iowa denied. *Mr. Frank Wisdom* for petitioner. *Messrs. John Fletcher* and *Neill Garrett* for respondent. Reported below: 223 N. W. 873.

No. 405. SANKEY *v.* SKELLY ET AL. October 21, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Robert B. Keenan, A. J. Hill,* and *Benjamin F. Bledsoe* for petitioner. *Messrs. W. P. Z. German, Alvin F. Molony, Mark McMahon,* and *Gillis A. Johnson* for respondents. Reported below: 33 F. (2d) 856.

No. 406. PASO ROBLES MERCANTILE CO. *v.* LUCAS, COMMISSIONER OF INTERNAL REVENUE. October 21, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Philip G. Sheehy* for petitioner. *Solicitor General Hughes,* and *Messrs. Claude R. Branch, J. Louis Monarch, John G. Remey,* and *W. Marvin Smith* for respondent. Reported below: 33 F. (2d) 653.

No. 90. HARRINGTON ET AL. *v.* SLOAN. See *ante,* p. 516.

No. 119. GANDY ET AL. *v.* LOUISIANA OIL REFINING CORP'N ET AL. See *ante,* p. 516.

No. 173. CENTRAL NAT'L BANK *v.* CITY OF LYNN. See *ante,* p. 516.

No. 183. TREMONT LUMBER CO. *v.* POLICE JURY ET AL. See *ante*, p. 517.

No. 199. WORKMAN *v.* BOONE ET AL. See *ante*, p. 517.

No. 200. WORKMAN ET AL. *v.* BOONE ET AL. See *ante*, p. 517.

No. 294. MUSELIN *v.* PENNSYLVANIA;
No. 295. ZIMA *v.* SAME; and
No. 296. RESETAR *v.* SAME. See *ante*, p. 518.

No. 343. DIANISH ET AL. *v.* VILLAGE OF BROADVIEW. See *ante*, p. 518.

No. 169. BOOTH ET AL. *v.* CLAPP ET AL. See *ante*, p. 519.

No. 341. VINYARD ET AL. *v.* NORTH SIDE CANAL CO. ET AL. See *ante*, p. 520.

No. 326. ARNALDO *v.* ROMAN CATHOLIC BISHOP OF JARO ET AL. October 28, 1929. Petition for writ of certiorari to the Supreme Court of the Philippine Islands denied. *Messrs. Wade H. Ellis, Daniel C. Roper, Henry J. Richardson,* and *W. D. Jameson* for petitioner. *Mr. Daniel C. Donoghue* for respondents.

No. 407. NEW YORK MARINE CO. *v.* CRANBERRY CREEK COAL CO. ET AL.;
No. 408. SAME *v.* LOUGHLIN;
No. 409. SAME *v.* HOWARD;
No. 410. SAME *v.* SINRAM BROTHERS, INC.; and

No. 411. SAME *v.* RED STAR TOWING & TRANSPORTATION Co. October 28, 1929. Petition for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Chauncey I. Clark* for petitioner. *Messrs. John C. Prizer* and *Carroll Single* for respondents. 33 F. (2d) 272.

No. 413. MURRAY ET AL. *v.* MONIDAH TRUST ET AL. October 28, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Alfred Lucking, William Lucking,* and *Nat Schmulowitz* for petitioners. *Mr. Edward I. Barry* for respondents. Reported below: 33 F. (2d) 379.

No. 416. YOUNG ET AL. *v.* SOUTHERN PACIFIC Co. October 28, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Dudley F. Phelps* and *Frank M. Swacker* for petitioners. *Mr. Gordon M. Buck* for respondent. Reported below: 34 F. (2d) 135.

No. 418. ATLANTA TERMINAL Co. *v.* GEORGIA PUBLIC SERVICE COMM'N. October 28, 1929. Petition for writ of certiorari to the Supreme Court of Georgia denied. *Messrs. Mark Bolding* and *Arthur Heyman* for petitioner. *Mr. Samuel D. Hewlett* for respondent. Reported below: 149 S. E. 189.

No. 419. BUSH TERMINAL Co. *v.* THE SIDNEY M. HAUPTMAN ET AL. October 28, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. O. D. Duncan* and *Russell T. Mount* for petitioner. *Messrs. Mark W. Maclay* and *John Tilney Carpenter* for respondents. Reported below: 34 F. (2d) 622.

No. 353. SWEET, TRUSTEE, *v.* UNITED STATES. November 4, 1929. Petition for writ of certiorari to the Court of Claims denied. *Mr. Theodore B. Benson* for petitioner. *Solicitor General Hughes, Assistant Attorney General Galloway,* and *Messrs. Claude R. Branch, George H. Foster,* and *W. Marvin Smith* for the United States. Reported below: 68 Ct. Cls. 109.

No. 420. UNITED STATES *v.* KOHLER CO. November 4, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Solicitor General Hughes,* and *Messrs. Howard T. Jones* and *George H. Foster* for the United States. No appearance for respondent. Reported below: 33 F. (2d) 225.

No. 421. BERG ET AL. *v.* LUCAS, COMMISSIONER OF INTERNAL REVENUE. November 4, 1929. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. Robert Bibb Hardison* for petitioners. *Solicitor General Hughes,* and *Messrs. Claude R. Branch, Sewall Key, Harvey R. Gamble,* and *W. Marvin Smith* for respondent. Reported below: 33 F. (2d) 641.

No. 422. ONEAL *v.* SAN JOSE CANNING CO. November 4, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Clarence A. Linn* for petitioner. *Mr. R. M. J. Armstrong* for respondent. Reported below: 33 F. (2d) 892.

No. 427. TINGLEY *v.* UNITED STATES. November 4, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. Warren K. Snyder* for petitioner. *Solicitor General Hughes, Assist-*

ant Attorney General Luhring, and *Messrs. Claude R. Branch, Harry S. Ridgely,* and *W. Marvin Smith* for the United States. Reported below: 34 F. (2d) 1.

No. 430. ROSENWALD *v.* LUCAS, COMMISSIONER OF INTERNAL REVENUE. November 4, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Robert N. Miller, Charles Lederer, Stuart Chevalier,* and *Ward Loveless* for petitioner. *Solicitor General Hughes,* and *Messrs. Sewall Key, Barham R. Gary, Clarence M. Charest,* and *Allin H. Pierce* for respondent. Reported below: 33 F. (2d) 423.

No. 431. UNITED STATES *v.* NEWPORT NEWS SHIPBUILDING & DRY DOCK CO. November 4, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Solicitor General Hughes, Assistant Attorney General Farnum,* and *Messrs. Claude R. Branch, H. H. Rumble, J. Frank Staley, Chauncey G. Parker,* and *F. R. Conway* for the United States. *Mr. Roscoe H. Hupper* for respondent. Reported below: 34 F. (2d) 100.

No. 403. MOE ET AL. *v.* ABERG ET AL. See *ante,* p. 522.

No. 465. HILL *v.* UNITED STATES. See *ante,* p. 522.

No. 472. HALLAM *v.* GRANT. See *ante,* p. 522.

No. 285. ABERNATHY ET AL. *v.* OKLAHOMA EX REL. GOAR ET AL. November 25, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. John Tomerlin, C. B. Stuart,* and

Stephen Chandler for petitioners. No appearance for respondents. Reported below: 31 F. (2d) 547.

No. 432. POLLOCK *v.* UNITED STATES. November 25, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. John Philip Hill* for petitioner. *Solicitor General Hughes,* and *Messrs. Claude R. Branch* and *Barham R. Gary* for the United States. Reported below: 34 F. (2d) 94.

No. 433. COOPER, NÉE PERRY, *v.* SPIRO STATE BANK. November 25, 1929. Petition for writ of certiorari to the Supreme Court of Oklahoma denied. *Messrs. Cicero F. Murray, R. A. Rittenhouse,* and *E. D. Means* for petitioner. *Mr. C. B. Cochran* for respondent. Reported below: 278 Pac. 648, 279 Pac. 903.

No. 434. JACOBS, NÉE CARNEY *v.* AMBRISTER ET AL. November 25, 1929. Petition for writ of certiorari to the Supreme Court of Oklahoma denied. *Messrs. Cicero F. Murray* and *F. A. Rittenhouse* for petitioner. *Messrs. T. J. Flannelly, W. D. Potter, Harry T. Klein, C. B. Cochran, J. H. Hill,* and *Frank B. Burford* for respondents. Reported below: 278 Pac. 653.

No. 439. ATWOOD ET AL. *v.* RHODE ISLAND HOSPITAL TRUST CO. November 25, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Messrs. Lyman K. Clark* and *Wm. E. Carnochan* for petitioners. *Messrs. Robert Thorne, Wm. R. Tillinghast, James C. Collins,* and *Dallas S. Townsend* for respondent. Reported below: 34 F. (2d) 18.

No. 441. SOUTHWESTERN OIL & GAS CO. *v.* UNITED STATES. November 25, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. James Walton* for petitioner. *Solicitor General Hughes,* and *Messrs. Claude R. Branch, Sewall Key,* and *Millar E. McGilchrist* for the United States. Reported below: 34 F. (2d) 446.

No. 447. NEW YORK, NEW HAVEN & HARTFORD R. Co. *v.* HENDRICKS. November 25, 1929. Petition for writ of certiorari to the Supreme Court of New York denied. *Messrs. Edward R. Brumley* and *John M. Gibbons* for petitioner. *Mr. Thomas J. O'Neill* for respondent. Reported below: 251 N. Y. 297.

No. 448. DICKEY *v.* HURD ET AL.; and

No. 449. SAME *v.* SAME. November 25, 1929. Petition for writs of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Marcus B. May* for petitioner. *Mr. E. H. Callaway* for respondents. Reported below: 33 F. (2d) 415.

No. 450. TIFFANY & CO. ET AL. *v.* DAVIS ET AL. November 25, 1929. Petition for writ of certiorari to the Supreme Court of Florida denied. *Messrs. Kenneth I. McKay* and *Maynard Ramsey* for petitioners. *Mr. O. K. Reaves* for respondents. Reported below: 123 So. 668.

No. 451. FAIRMONT GLASS WORKS *v.* CUB FORK COAL CO. ET AL. November 25, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Henry H. Hornbrook* for petitioner.

Messrs. C. W. Nichols, Connor Hall, and *D. C. T. Davis, Jr.,* for respondents. Reported below: 33 F. (2d) 420.

No. 396. DE LEON ET AL. *v.* IGNACIO. December 2, 1929. Petition for writ of certiorari to the Supreme Court of the Philippine Islands denied. *Messrs. Felix De Leon* and *Vincente Sotto, pro se,* for petitioners. No appearance for respondent.

No. 436. KASHERMAN *v.* MINNESOTA. December 2, 1929. Petition for writ of certiorari to the Supreme Court of Minnesota denied. *Mr. Benjamin M. Rigler* for petitioner. *Mr. James E. Markham* for respondent. Reported below: 224 N. W. 838.

No. 437. FIDELITY-PHILADELPHIA TRUST CO. *v.* MCCAUGHN, FORMERLY COLLECTOR. December 2, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. H. Gordon McCouch* for petitioner. *Solicitor General Hughes,* and *Messrs. Claude R. Branch, Sewall Key, Millar E. McGilchrist,* and *W. Marvin Smith* for respondent. Reported below: 34 F. (2d) 600.

No. 438. LEVY *v.* UNITED STATES. December 2, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Richard L. Merrick* and *Howard F. Bresee* for petitioner. *Solicitor General Hughes, Assistant Attorney General Luhring,* and *Messrs. Claude R. Branch* and *Harry S. Ridgely* for the United States.

No. 446. CHESAPEAKE & OHIO R. CO. *v.* KANAWHA BLACK BAND COAL CO. ET AL. December 2, 1929. Peti-

tion for writ of certiorari to the Supreme Court of Appeals of West Virginia denied. *Messrs. C. W. Strickling, M. Carter Hall,* and *David H. Leake* for petitioner. *Mr. A. A. Lilly* for respondents. Reported below: 148 S. E. 855.

No. 453. JACOBS ET AL. *v.* LUCAS, COMMISSIONER OF INTERNAL REVENUE. December 2, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. David Goldsmith* for petitioners. *Solicitor General Hughes, Messrs. Claude R. Branch, Sewall Key,* and *W. Marvin Smith* and *Helen R. Carloss* for respondent. Reported below: 34 F. (2d) 233.

No. 455. KOKUSAI KISEN KABUSHIKI KAISHA *v.* TEXAS GULF SULPHUR CO. December 2, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. George C. Sprague* and *George W. Betts, Jr.,* for petitioner. *Messrs. Henry M. Longley* and *Ezra G. Benedict Fox* for respondent. Reported below: 33 F. (2d) 232.

No. 456. COURSEY ET AL. *v.* FIRESTONE TIRE & RUBBER CO. December 2, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Fred A. Wright* and *James C. Kinsler* for petitioners. *Mr. P. E. Boslaugh* for respondent. Reported below: 33 F. (2d) 49.

No. 461. DRY DOCK, EAST BROADWAY & BATTERY R. CO. *v.* CITY OF NEW YORK. December 2, 1929. Petition for writ of certiorari to the Supreme Court of New York denied. *Mr. Alfred T. Davison* for petitioner. *Messrs.*

Arthur J. W. Hilly, J. Joseph Lilly, and *Elliot S. Benedict* for respondent. 251 N. Y. 583.

No. 464. BRINKERHOFF-FARIS TRUST & SAVINGS CO. *v.* HILL, TREASURER. December 2, 1929. Petition for writ of certiorari to the Supreme Court of Missouri denied. *Mr. Roy W. Rucker* for petitioner. *Mr. Lieutellus Cunningham* for respondent. Reported below: 19 S. W. (2d) 746. See *ante,* p. 550.

No. 466. MASSACHUSETTS GASOLINE & OIL CO. *v.* GO GAS CO. ET AL. December 2, 1929. Petition for writ of certiorari to the Superior Court in and for the County of Worcester, Massachusetts, denied. *Mr. Harry M. Welch* for petitioner. *Mr. LaRue Brown* for respondents.

No. 467. FAIRBANKS, MORSE & CO. ET AL. *v.* AMERICAN VALVE & METER CO. ET AL. December 2, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Fred L. Chappell* and *Howard M. Cox* for petitioners. *Mr. F. A. Whiteley* for respondents. 31 F. (2d) 103; 34 F. (2d) 869.

No. 471. SAINT PAUL FIRE & MARINE INS. CO. *v.* ELDRACHER ET AL. December 2, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. S. H. West* and *Henry Davis* for petitioner. *Mr. Patrick H. Cullen* for respondents. Reported below: 33 F. (2d) 675.

No. 476. HATMAKER *v.* DRY MILK CO. December 2, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. James Robinson Hatmaker, pro se,* for petitioner. *Mr. Fritz v. Briessen* for respondent. Reported below: 34 F. (2d) 609.

No. 487. MORRIS, TRUSTEE, ET AL. *v.* PAVIA. December 2, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Edwin L. Garvin* for petitioners. *Mr. Samuel J. Rosensohn* for respondent. Reported below: 33 F. (2d) 963.

No. 247. TROCHE v. CALIFORNIA. See *ante*, p. 524.

No. 40. GREENWAY APARTMENT CO. *v.* THE CONVENTION OF THE PROTESTANT EPISCOPAL CHURCH ET AL. See *ante*, p. 525.

No. 46. ANGLO & LONDON-PARIS NAT'L BANK *v.* CONSOLIDATED NAT'L BANK. See *ante*, p. 526.

No. 51. GULF, MOBILE & NORTHERN R. Co. *v.* WILLIAMS. See *ante*, p. 526.

No. 58. FIRST ADDITION TO THE RATTLE SNAKE DRAINAGE DISTRICT ET AL. *v.* BODEMAN ET AL. See *ante*, p. 527.

No. 415. LA PLAIN ET AL. *v.* ALLARD. See *ante*, p. 527.

No. 473. WORLEY *v.* HAWKER. December 9, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Neal E. McNeill* for petitioner. No appearance for respondent. Reported below: 33 F. (2d) 491.

No. 474. OWENS *v.* BATTENFIELD ET AL. December 9, 1929. Petition for writ of certiorari to the Circuit Court

of Appeals for the Eighth Circuit denied. *Mr. Joseph W. Bailey, Jr.*, for petitioner. *Mr. J. B. Dudley* for respondents. Reported below: 33 F. (2d) 753.

No. 479. DUNAGAN, ADMINISTRATRIX, *v.* APPALACHIAN POWER CO. January 6, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. William H. Werth* for petitioner. *Mr. D. H. Leake* for respondent. Reported below: 33 F. (2d) 876.

No. 480. KOLPACHNIKOFF *v.* UNITED STATES. January 6, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Francis B. Bracken* for petitioner. *Solicitor General Hughes, Assistant Attorney General Luhring,* and *Messrs. Claude R. Branch, Harry S. Ridgely,* and *W. Marvin Smith* for the United States. Reported below: 34 F. (2d) 139.

No. 481. FIDELITY-PHILADELPHIA TRUST CO. ET AL., TRUSTEES, *v.* PHILADELPHIA-GIRARD NATIONAL BANK, January 6, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Robert R. McCracken* for petitioners. No appearance for respondent. Reported below: 33 F. (2d) 649.

No. 482. JOHNSTON *v.* WOLTER, TRUSTEE. January 6, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. S. Leo Rushlander* for petitioner. *Mr. Carl M. Wolter* for respondent. Reported below: 34 F. (2d) 598.

No. 489. EDELSTEIN *v.* GILLMORE ET AL. January 6, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Nathan Burkan* for petitioner. *Emily Holt* for respondents. Reported below: 35 F. (2d) 723.

No. 478. SOUTHERN SURETY CO. *v.* SHELDON ET AL. January 6, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. Suggestion of a diminution of the record and motion for a writ of certiorari is also denied. *Mr. W. C. Mathes* for petitioner. *Mr. Ewell D. Moore* for respondents. Reported below: 33 F. (2d) 289.

No. 545. HUNTER *v.* BAASH-ROSS TOOL CO. ET AL. See *ante*, p. 531.

No. 483. TOWER HILL CONNELLSVILLE COKE CO. *v.* PIEDMONT COAL CO. ET AL. January 13, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. E. W. Knight* for petitioner. *Messrs. Edwin W. Smith, Arthur S. Dayton, E. C. Higbee,* and *Wm. M. Robinson* for respondents. Reported below: 33 F. (2d) 703.

No. 488. UNITED STATES EX REL. KOMLOS *v.* TRUDELL, IMMIGRATION INSPECTOR. January 13, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Harold Van Riper* for petitioner. *Solicitor General Hughes, Assistant Attorney General Luhring,* and *Messrs. Claude R. Branch, Harry S. Ridgely,* and *W. Marvin Smith* for respondent. Reported below: 35 F. (2d) 281.

No. 496. WAITE ET AL. *v.* UNITED STATES;

No. 497. SAME *v.* CROOKS, COLLECTOR OF INTERNAL REVENUE; and

No. 498. HIBBARD, ADMINISTRATRIX, ET AL. *v.* CROOKS, COLLECTOR OF INTERNAL REVENUE. January 13, 1930. Petition for writs of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Allen McReynolds* for petitioners. *Solicitor General Hughes, Assistant Attorney General Youngquist,* and *Messrs. Claude R. Branch, Sewall Key, M. K. Rothschild, W. Marvin Smith, Clarence M. Charest,* and *Ottamar Hamele* for respondents. Reported below: 33 F. (2d) 567.

No. 502. HOFFER OIL CORP'N *v.* CARPENTER. January 13, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. Leonard M. Levy* for petitioner. *Mr. Stephen A. George* for respondent. Reported below: 34 F. (2d) 589.

No. 504. ILLINOIS CENTRAL R. CO. *v.* CITY OF MAYFIELD ET AL. January 13, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Edmund F. Trabue, John C. Doolan, Robert V. Fletcher,* and *Charles N. Burch* for petitioner. *Mr. W. V. Gregory* for respondents. 35 F. (2d) 808.

No. 505. POWELL *v.* WASHINGTON. January 13, 1930. Petition for writ of certiorari to the Supreme Court of Washington denied. *Mr. Charles H. Miller* for petitioner. *Mr. James W. Bryan* for respondent. Reported below: 279 Pac. 573.

No. 506. HIGHLAND MILK CONDENSING CO. *v.* PHILLIPS, COLLECTOR OF INTERNAL REVENUE. January 13,

1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Hugh Satterlee* for petitioner. *Solicitor General Hughes, Assistant Attorney General Youngquist,* and *Messrs. Claude R. Branch, Sewall Key,* and *Clarence M. Charest* for respondent. Reported below: 34 F. (2d) 777.

No. 507. LISCIO *v.* CAMPBELL, FEDERAL PROHIBITION ADMINISTRATOR, ET AL. January 13, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Charles Dickerman Williams* for petitioner. *Solicitor General Hughes, Assistant Attorney General Youngquist,* and *Messrs. Claude R. Branch, John Henry McEvers,* and *W. Marvin Smith* for respondents. Reported below: 34 F. (2d) 646.

No. 508. ORIOLE PHONOGRAPH CO. ET AL. *v.* KANSAS CITY FABRIC PRODUCTS CO. ET AL. January 13, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. George H. English* and *Thomas Hackney* for petitioners. *Mr. H. B. Manard* for respondents. Reported below: 34 F. (2d) 400.

No. 512. MARTIN *v.* MARTIN ET AL. January 13, 1930. Petition for writ of certiorari to the Supreme Court of Appeals of West Virginia denied. *Mr. J. Raymond Gordon* for petitioner. *Mr. Harold A. Ritz* for respondents.

No. 529. GULF SMOKELESS COAL CO. ET AL. *v.* SUTTON, STEELE & STEELE ET AL. January 13, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. Walter L. Fisher* and

Francis W. Parker, Jr., for petitioners. *Mr. D. J. F. Strother* for respondents. Reported below: 35 F. (2d) 433.

No. 532. WILDERMUTH *v.* HAZELTINE CORP'N. January 13, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Charles Neave* and *Cornelius D. Ehret* for petitioner. *Messrs. Wm. H. Davis* and *R. Morton Adams* for respondent. Reported below: 34 F. (2d) 635.

No. 544. GUTIERREZ ET AL. *v.* MIDDLE RIO GRANDE CONSERVANCY DISTRICT ET AL. January 13, 1930. Petition for writ of certiorari to the Supreme Court of New Mexico denied. *Messrs. E. R. Wright* and *Wm. A. Sutherland* for petitioners. *Mr. Pearce C. Rodey* for respondents. Reported below: 282 Pac. 1.

No. 470. YAMHILL ELECTRIC CO. *v.* MCMINNVILLE. See *ante*, p. 531.

No. 475. SOUTHERN CALIFORNIA EDISON CO. *v.* RAILROAD COMM'N OF CALIFORNIA. See *ante*, p. 532.

No. 513. HARMAR COAL CO. *v.* HEINER, COLLECTOR OF INTERNAL REVENUE. January 20, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Wm. A. Seifert* for petitioner. *Solicitor General Hughes, Assistant Attorney General Youngquist*, and *Messrs. Claude R. Branch, Sewall Key, A. H. Conner, W. Marvin Smith, Clarence M. Charest*, and *L. H. Bayliss* for respondent. Reported below: 34 F. (2d) 725.

No. 514. INDIANOLA COAL CO. *v.* HEINER, COLLECTOR OF INTERNAL REVENUE; and

No. 515. SAME *v.* LEWELLYN, FORMERLY COLLECTOR OF INTERNAL REVENUE. January 20, 1930. Petition for writs of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Wm. A. Seifert* for petitioner. *Solicitor General Hughes, Assistant Attorney General Youngquist,* and *Messrs. Claude R. Branch, Sewall Key, A. H. Conner, W. Marvin Smith, Clarence M. Charest,* and *L. H. Bayliss* for respondents. Reported below: 32 F. (2d) 725.

No. 516. BESSEMER COAL & COKE CO. *v.* HEINER, COLLECTOR OF INTERNAL REVENUE; and

No. 517. SAME *v.* LEWELLYN, FORMERLY COLLECTOR OF INTERNAL REVENUE. January 20, 1930. Petition for writs of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Wm. A. Seifert* for petitioner. *Solicitor General Hughes, Assistant Attorney General Youngquist,* and *Messrs. Claude R. Branch, Sewall Key, A. H. Conner, W. Marvin Smith, Clarence M. Charest,* and *L. H. Bayliss* for respondents. Reported below: 32 F. (2d) 725.

No. 518 WALKER ET AL. *v.* TRAYLOR ENGINEERING & MFG. CO. January 20, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Wilson A. Chase* for petitioners. No appearance for respondent. Reported below: 34 F. (2d) 748.

No. 521. LION LABORATORIES, INC., ET AL. *v.* CAMPBELL, FEDERAL PROHIBITION ADMINISTRATOR, ET AL. January 20, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Charles*

Dickerman Williams for petitioners. *Solicitor General Hughes, Assistant Attorney General Youngquist,* and *Messrs. Claude R. Branch, John Henry McEvers, Mahlon D. Kiefer,* and *W. Marvin Smith* for respondents. Reported below: 34 F. (2d) 342

No. 527. BANK OF CHINA ET AL. *v.* MCDONNELL, ASSIGNEE, ET AL. January 20, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Frank E. Hinckley* and *Henry M. Campbell* for petitioners. *Messrs. Alfred Sutro* and *Cornell S. Franklin* for respondents. Reported below: 33 F. (2d) 816.

No. 534. EMLENTON REFINING CO. *v.* CHAMBERS. January 20, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. David A. Reed* for petitioner. *Mr. J. T. Manning, Jr.,* for respondent. Reported below: 35 F. (2d) 273.

No. 167. HANOVER FIRE INS. CO. *v.* SPECKTOR ET AL. See *ante,* p. 92A.

No. 503. HANNA, EXECUTOR, *v.* UNITED STATES. January 27, 1930. Petition for writ of certiorari to the Court of Claims denied. *Mr. Heber Smith* for petitioner. *Solicitor General Hughes,* and *Messrs. Claude R. Branch, Andrew D. Sharpe, Charles F. Kincheloe, Fred K. Dyar,* and *W. Marvin Smith* for the United States. Reported below: 68 Ct. Cls. 45.

No. 519. GANDARA *v.* UNITED STATES. January 27, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Edward*

I. Barry for petitioner. *Solicitor General Hughes, Assistant Attorney General Farnum,* and *Mr. Claude R. Branch* for the United States. Reported below: 33 F. (2d) 394.

No. 522. LITTLE FOUR OIL & GAS CO. *v.* LEWELLYN, FORMERLY COLLECTOR; and

No. 523. SAME *v.* HEINER, COLLECTOR OF INTERNAL REVENUE. January 27, 1930. Petition for writs of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. William G. Heiner* for petitioner. *Solicitor General Hughes, Assistant Attorney General Youngquist,* and *Messrs. Claude R. Branch, Sewall Key, A. H. Conner, W. Marvin Smith, Clarence M. Charest,* and *L. L. Baylies* for respondents. Reported below: 35 F. (2d) 149.

No. 531. MISSOURI PACIFIC R. CO. *v.* BEGLEY. January 27, 1930. Petition for writ of certiorari to the Supreme Court of Kansas denied. *Messrs. Wm. P. Waggener* and *J. M. Challis* for petitioner. *Mr. Fred Robertson* for respondent. Reported below: 128 Kan. 790.

No. 533. ROACH *v.* LOS ANGELES & SALT LAKE R. CO. January 27, 1930. Petition for writ of certiorari to the Supreme Court of Utah denied. *Mr. Charles M. Morris* for petitioner. *Mr. George H. Smith* for respondent. Reported below: 280 Pac. 1053.

No. 537. BRACH ET AL. *v.* MOEN. January 27, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Edward R. Johnston* and *Henry J. Darby* for petitioners. *Mr. Joseph P. Shoup* for respondent. Reported below: 35 F. (2d) 475.

No. 540. NATIONAL SURETY CO. *v.* AUSTIN MACHINERY CORP. ET AL. January 27, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Marion G. Evans* and *J. W. Cutrer* for petitioner. *Mr. Wm. P. Metcalf* for respondents. 35 F. (2d) 842.

No. 543. MISSOURI PACIFIC R. CO. *v.* RAMEY. January 27, 1930. Petition for writ of certiorari to the Supreme Court of Missouri denied. *Messrs. Harry R. Stocker* and *Edward J. White* for petitioner. *Messrs. Ed. L. Abington, John W. Campbell,* and *Carl C. Abington* for respondent. 21 S. W. (2d) 873.

CASES DISPOSED OF WITHOUT CONSIDERATION BY THE COURT, FROM OCTOBER 7, 1929, TO AND INCLUDING JANUARY 27, 1930.

No. 91. SUNCREST LUMBER CO. *v.* NORTH CAROLINA PARK COMM'N ET AL. Appeal from the District Court for the Western District of North Carolina. October 7, 1929. Dismissed with costs pursuant to paragraph 2 of Rule 13. *Mr. Thomas S. Rollins* for appellant. *Mr. Mark Squire* for appellees. Reported below: 29 F. (2d) 823.

No. 223. AETNA LIFE INS. CO. *v.* ALLEN, ADMINISTRATOR OF THE ESTATE OF ARTHUR N. DORITY AND CARRIE J. DORITY. On petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit. October 7, 1929. Dismissed per stipulation of counsel. *Mr. Wm. H. Gulliver* for petitioner. *Mr. Carl C. Jones* for respondent. Reported below: 30 F. (2d) 490.

No. 33. O'CONNOR *v.* ANDERSON, COLLECTOR OF INTERNAL REVENUE. On writ of certiorari to the Circuit Court of Appeals for the Second Circuit. November 25, 1929. Judgment affirmed, with costs per stipulation of counsel, and cause remanded to the District Court for the Southern District of New York. *Mr. D. Basil O'Connor, pro se,* for petitioner. *Attorney General Mitchell* for respondent. Reported below: 28 F. (2d) 873.

No. 334. BECKER STEAMSHIP COMPANY *v.* SNYDER. On writ of certiorari to the Court of Appeals of Ohio. January 6, 1930. Dismissed per stipulation of counsel. *Messrs. Frederick L. Leckie, S. H. Holding,* and *Tracy H. Duncan* for petitioner. *Mr. Luther Day* for respondent. 31 Ohio App. 379.

AMENDMENTS OF BANKRUPTCY RULES.

It is ordered that the following rule be adopted and established as an addition to the General Orders in Bankruptcy:

"XLVI

"Whenever a custodian, receiver or trustee is a banking institution designated and qualified pursuant to section 61 of the Act to act as depositary for money, said banking institution may, if authorized by rule of the local Bankruptcy Court approved by a majority of the Circuit Judges of the Circuit, keep on deposit with itself money received by it as custodian, receiver or trustee, if said banking institution under the local laws of the state of its domicile is permitted to keep on deposit with itself money collected and received by it acting as receiver or trustee under the appointment of any court. Such local rule shall contain such provisions for the supervision and control of such deposits as the court may deem adequate, and on all sums of money not less than $100 so kept on deposit interest shall be allowed by such banking institution at such rate, not less than two per centum per annum, as may from time to time be directed by local rule."

It is further ordered that Rule XXXIX, promulgated April 13, 1925 (267 U. S. 613), be amended to read as follows:

"XXXIX

"REPRESENTATION OF CREDITORS BY RECEIVERS OR THEIR ATTORNEYS

"Neither a receiver nor his attorney shall solicit any proof of debt, power of attorney or other authority to act for or represent any creditor for any purpose in connec-

tion with the administration of the estate in bankruptcy or the acceptance or rejection of any composition offered by a bankrupt. The local Bankruptcy Court may, however, whenever a banking institution is under local rule or practice always appointed receiver in cases requiring the services of a receiver, by local rule approved by a majority of the Circuit Judges of the Circuit, provide that notice may be given to the creditors of the availability of such institution to act as trustee if elected, and may provide means to facilitate the creditors in filing and voting their claims in favor of the election of such institution as trustee."

JANUARY 13, 1930.

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3. *Id.* One purchasing shares as gift for his minor children, in whose names certificates are issued, is liable for subsequent assessments. *Id.*

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PRINCIPAL AND AGENT. See **Constitutional Law,** V, 6; **Insurance.**

PRIORITY. See **Insolvency.**

PROCEDURE. See **Jurisdiction; Packers and Stockyards Act,** 6, 8, 10.

1. *Pleadings. Equity Rule 30.* Strict proof required of plaintiff by answer denying knowledge or information as to allegation. *Grant* v. *A. B. Leach & Co.,* 351.

2. *Assignments of Error.* Must cover questions to be raised. *Herbring* v. *Lee,* 111.

3. *Scope of Review.* When limited to federal question discussed in state court's opinion. *Silver* v. *Silver,* 117.

4. *Id. Certiorari.* Validity of patent not determined on review of conflicting decisions of two circuits dealing only with question of infringement. *Sanitary Refrigerator Co.* v. *Winters,* 30.

PROHIBITION ACT. See **Constitutional Law,** IV, 4–5.

PUBLIC LANDS. See **Indians.**

1. *Mineral Lands.* Perfected location of mining claim under General Mining Law is tantamount to a grant by the United States. *Wilbur* v. *Krushnic,* 306.

2. *Assessment Labor.* Failure to perform does not forfeit claim but only renders it subject to loss by relocation. *Id.*

3. *Id.* Under Mineral Leasing Act of 1920, owner of oil placer may resume work and thus "maintain" it. *Id.*

4. *Patent.* Mandamus to compel Secretary of Interior to hear application for when refusal based on plain misconstruction of statute. *Id.*

PUBLIC OFFICERS. See **Parties,** 2.

PUBLIC UTILITIES. See **Constitutional Law**, V, 9–10; **Municipal Corporations.**

1. *Character of Property.* Though devoted to public service property of utility is none the less private and entitled to protection of due process clause. *United Railways & Elec. Co.* v. *West*, 234.

2. *Adequate Return.* Enforcement against street railway company of rates producing less than 7.44 per cent., *held* denial of due process. *Id.*

3. *Id.* Cannot be determined by decisions of other years under radically different conditions. *Id.*

4. *Allowance for Annual Depreciation.* Must be based upon present value, not upon cost. *Id.*

5. *Compulsory Service.* Street railway company cannot complain that particular line is unprofitable where rates for system as a whole yield adequate return. *Id.*

6. *Judicial Notice.* Of increase in recent years of annual returns on invested capital, and of wages and cost of maintenance. *Id.*

RAILROADS. See **Employers' Liability Act**; **Interstate Commerce Acts**; **Insolvency**; **Municipal Corporations**; **Negligence**, 2; **Parties**, 2; **Public Utilities.**

RATES. See **Constitutional Law**, IV, 1; V, 9–10; **Interstate Commerce Acts**; **Municipal Corporations**; **Packers and Stockyards Act**, 2–9; **Public Utilities.**

RECEIVERS. See **Farm Loan Act.**

1. *Ohio Court of Common Pleas.* Jurisdiction to appoint, and control over receiver. *Grant* v. *A. B. Leach & Co.*, 351.

2. *Id.* Order authorizing and directing receiver to bring action, not subject to collateral attack in federal court. *Id.*

RELIGIOUS ORGANIZATIONS. See **Parties**, 1.

1. *Trusts.* Powers and duties of Roman Catholic Archbishopric relative to trust founding a collative chaplaincy, and to disposition of income from trust property. *Gonzalez* v. *Archbishop*, 1.

2. *Id. Jurisdiction of Civil Courts* and ecclesiastical tribunals. *Id.*

RES JUDICATA. See **Packers and Stockyards Act**, 9; **Patents for Inventions**, 6; **Receivers**, 2.

RESTRAINT OF TRADE. See **Anti-Trust Acts.**

RETROACTIVE LAW. See **Constitutional Law**, IV, 3.

ROYALTIES. See **Indians**, 6.

SECRETARY OF AGRICULTURE. See **Packers and Stockyards Act**, 2–7.

SECRETARY OF THE INTERIOR. See **Public Lands**, 4.

SERVICE OF PROCESS. See **Constitutional Law**, V, 12–14.

STATUTES. See **Corrupt Practices Act**, 2–4; **Indians.**

1. *Administrative Construction.* Where acted on for a period of years will be favored by court. *Luckenbach S. S. Co.* v. *United States*, 173; *United States* v. *Jackson*, 183.

2. *Id.* Will not be disturbed except for weighty reasons. *Brewster* v. *Gage*, 327.

3. *Id.* Re-enactment of provisions *held* persuasive evidence of legislative approval. *Id.*

STOCKHOLDERS. See **Banks and Banking**, 1–4; **Farm Loan Act.**

Right to Dividends. Non-cumulative preferred stock not entitled to dividend credit for year when earnings were applied to capital improvements. *Wabash R. Co.* v. *Barclay*, 197.

STREET RAILWAYS. See **Municipal Corporations**; **Public Utilities.**

SURETIES. See **Parties**, 3.

TAXATION. See **Constitutional Law**, I, 1–3; III, 2–3; IV, 3; V, I–8; **Indians**, 4, 6.

I. In General, p. 637.
II. Federal Taxation, p. 637.
III. State Taxation, p. 639.

I. **In General.**

1. *Recovery of Payment.* Taxpayer has burden of proving illegality of tax already paid. *Reinecke* v. *Spalding*, 227.

2. *Mobilia Sequuntur Personam.* Maxim not applicable where injustice would result. *Safe Deposit & Tr. Co.* v. *Virginia*, 83.

3. *Id.* Maxim applies to negotiable bonds and certificates of indebtedness issued by State or municipality. *Farmers Loan & Tr. Co.* v. *Minnesota*, 204.

II. **Federal Taxation.**

1. *Retroactive Effect of Act.* Section 202 (a) (2) of Revenue Act of 1921, in application to gain from sale of property acquired by gift, *held* intended to have retroactive effect. *Cooper* v. *United States*, 409.

TAXATION—Continued.

2. *Gain From Sale; How Computed.* Under Revenue Acts of 1918 and 1921, § 202 (a), basis for computing gain from sale of securities acquired by bequest after March 1, 1913, is value at date of testator's death. *Brewster* v. *Gage,* 327.

3. *Id.* Section 113 (a) (5) of the Revenue Act of 1928, defining basis for calculating gain or loss from sales of property acquired by bequest, held not intended to affect construction of earlier acts. *Id.*

4. *Capital Gain.* Owner not entitled to more favorable rate allowed by Revenue Act of 1921, § 206 (a) (6), where goods are properly regarded as part of stock in trade. *Renziehausen* v. *Lucas,* 387.

5. *Allowance for Obsolescence.* Owner of business proscribed by prohibition legislation not entitled to deduction for "exhaustion" or "obsolescence" of good will. *Clarke* v. *Haberle C. S. Brewing Co.,* 384; *Renziehausen* v. *Lucas,* 387.

6. *Deduction for Losses.* Claim of deduction as loss sustained in 1919 of amount of judgment suffered in 1922 and paid in 1923, *held* properly rejected. *Lucas* v. *American Code Co.,* 445.

7. *Id.* Reserves to cover contingent liabilities not allowable as deductions. *Id.*

8. *Deduction for Depletion.* Amount allowable to lessor under royalty lease made prior to March 1, 1913, computed on basis of fair market value of lessor's interest as of that date in mine as an entity. *Reinecke* v. *Spalding,* 227.

9. *"Basis of Keeping Accounts."* As used in Act of September 8, 1916, § 13, par. (d) refers to general bookkeeping system followed by taxpayer. *United States* v. *American Can Co.,* 412.

10. *Correction of Valuations and Reassessment.* Does not constitute rejection by Commissioner of basis upon which return was made. *Id.*

11. *Limitations.* Period barring assessment (Act of 1921, § 250 (d)) does not begin to run with filing of "tentative return." *Florsheim Bros. Co.* v. *United States,* 453.

12. *Id.* A waiver, Act of 1921, § 250 (d), extending the statutory period limiting the time in which assessment and collection may be made can not operate as limitation on power of Congress to extend period. *Id.*

TAXATION—Continued.

13. *Id. Applicability of Later Acts.* Six years limitation of Act of 1924, § 278 (d), applies to assessments made after its enactment and not previously barred. *Id.*

14. *Id.* Six years limitation of Act of 1926, § 278 (d), applies to an assessment the collection of which was not barred prior to the enactment. *Id.*

III. **State Taxation.**

1. *Situs of Intangibles.* State or municipal bonds and certificates of indebtedness, owned and held by person domiciled in another State and not used elsewhere in business, *held* subject to tax on testamentary transfer at domicile of owner, not in State where issued. *Farmers Loan & Tr. Co.* v. *Minnesota,* 204. See *Safe Deposit & Tr. Co.* v. *Virginia,* 83.

2. *Tax on Gross Receipts.* Found to be direct tax on receipts derived from interstate commerce, and therefore void, *pro tanto. New Jersey Bell Tel. Co.* v. *State Board of Taxes,* 338.

3. *Effect of Contract.* Vendor may not escape state taxation by a contract the only purpose of which is to convert local transaction into one in interstate commerce. *Superior Oil Co.* v. *Mississippi,* 390.

TELEPHONE COMPANIES. See **Taxation,** II, 2.

TITLE. See **Executors and Administrators.**

TORTS. See **Negligence.**

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TREATIES. See **Indians.**

TRUSTS. See **Banks and Banking,** 4; **Indians,** 1–3; **Jurisdiction; Parties; Religious Organizations.**

1. *Testamentary Trust,* founding collative chaplaincy. Right of heir to compel appointment and accounting for income. *Gonzalez* v. *Archbishop,* 1.

2. *Implied Trust.* Not created by purchase of national bank stock by father in names of children. *Early* v. *Richardson,* 496.

UNFAIR COMPETITION. See **Federal Trade Commission.**

UNITED STATES. See **Insolvency.**

VALUATION. See **Public Utilities.**

VERDICT. See **Employers' Liability Act**, 4.

Indeterminate. Where for single sum on two causes of action, one of which was erroneously allowed to go to jury, judgment must be reversed and remanded for new trial. *Baltimore & O. S. W. R. Co.* v. *Carroll*, 491.

WAGE FIXING. See **Constitutional Law**, IV, 1.

WAIVER. See **Taxation**, II, 12.

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WATERS. See **Navigable Waters.**

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